(21,729.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 72.

BANKER BROTHERS COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

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1 In the Superior Court of Pennsylvania in and for the Fifth District.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, sct:

Among the records and proceedings of the Superior Court of Pennsylvania, in and for the Fifth District, the following may be found as matter of file and of record at No. 181 April Term, 1908, to wit:

2 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

In the Court of Common Pleas No. Four of Allegheny County, Pa.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKERs BROTHERS CO.

No. 796 First Term, 1908 December 18th, 1907. Case stated filed Jan'y 3rd, 1908 Amendment to case stated filed Jan'y 22nd, 1908, On Argument List. Findings for Commonwealth. Eo Die, Opinion and Order filed. Febr'y 4th, 1908, Judgment for Pl'ff as per order in the sum of three hundred fifty-four dollars ($354.00) and costs Febr'y 8th, 1908, Defendant appeals to Superior Court Eo Die, Bond of Defendant with M. N. Murray as surety in the sum of $800.—approved and filed. February 8th, 1908, Certiorari filed.
From the Record,
[SEAL.] W. B. KIRKER,
Prothonotary.

3 In the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania.

No. —. Fourth Term, 1907.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY

And now, to wit, Dec. 18th, 1907, it is hereby agreed that the Prothonotary of said court shall enter the above suit upon his docket, and that from the time of such entry the said action or suit shall be deemed to be pending in like manner as if the said defendant had appeared to a summons in assumpsit issued against it by the Commonwealth of Pennsylvania.

It is further agreed by and between the said parties that the following case be stated for the opinion of the court in the nature of a special verdict.

Banker Brothers Company, defendant above named, is a corporation organized and existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, and is engaged, inter alia, in the business of selling an automobile known under the name of "Pierce Great Arrow," which automobile
4 is manufactured in the City of Buffalo, State of New York, by the George N. Pierce Company, a corporation of the State of New York, located in the City and State aforesaid, and the defendant is the exclusive agent and representative of the said George N. Pierce Company for the Pittsburgh territory, as specifically described and mentioned in the contract entered into between said George N. Pierce Company and the defendant, a copy of which is hereto attached, made part hereof and marked Exhibit "A."

That the said contract marked Exhibit "A" is the genuine existing contract between the George N. Pierce Company of Buffalo, New York, and the defendant company, and is the basis of the existing relations and dealings between the said parties thereto and of the right of said defendant to sell said automobile in said Pittsburgh territory.

That by virtue of said contract, the defendant company, in the transaction of its business of selling and handling the Pierce Great Arrow automobile, makes sales of the same, as is agreed by the parties hereto, in the manner following:

(*a*) All orders for said automobiles and all sales of same are solicited and made by and through demonstrations of said machines by means of demonstrating cars of the same type as that offered for sale, owned and used and always on hand for such purposes only, by the defendant company, and which demonstrating cars
5 defendant is required to have and use for such purpose by the George N. Pierce Company.

(*b*) Defendant solicits orders for the purchase of said automobiles from its customers only within the territory described in said contract. That the order is upon an order form of the defendant company, a copy of which is attached hereto, made part hereof and marked Exhibit "B."

(*c*) Said customers or purchasers in every case specify the color of paint, finish and such special appointments, attachments and features as they may desire.

(*d*) Such order or contract for purchase of said automobiles is solicited and accepted only at the list price as specified by the said George N. Pierce Company, the manufacturer, as set forth in said Exhibit "A."

(*e*) Said customer or purchaser immediately upon the signing of said order, pays to the defendant company at least ten per cent of the list price (as set forth in said Exhibit "A") in cash and the balance on delivery.

(*f*) Defendant company thereupon forwards said order or a copy of same, together with said cash payment to the George N.
6 Pierce Company at Buffalo, New York, where said order is accepted and is listed in the order in which it is received, and the said George N. Pierce Company then proceed to the manufacture of the automobile so ordered.

(*g*) Said automobile being completed, defendant company is duly notified by said George N. Pierce Company of the date of shipment of same, and same is accordingly shipped for the purchaser in the name of the defendant company with Bill of Lading and sight draft on defendant company attached, for the balance of the list price due George N. Pierce Company less a discount or the defendant company's commission of twenty per cent.

(*h*) Defendant then delivers the car to and collects from the purchaser.

(*i*) The George N. Pierce Company guarantees direct to the purchaser their construction of said automobile and all workmanship and material thereon.

3rd. It is further agreed that the defendant company does not have on hand or at any time carry in stock for sale as part of its business any new or unused "Pierce Great Arrow" automobiles.

7 4th. That defendant has no choice or control whatsoever over the selling price of said automobiles.

5th. That defendant's right of sale does not extend beyond the territory mentioned in said contract Exhibit "A" and defendant company has no authority to appoint sub-agents or dealers, except by the consent of the George N. Pierce Company and as specified in said contract Exhibit "A."

6th. That all authority, pertaining to the sale of said automobiles in the territory specified is retained and exercised by the George N. Pierce Company, who for any violation of the terms of said contract may terminate same upon ten days' notice.

7th. That said contract can be terminated by either party at any time upon notice for or without cause.

8th. That the discount or commission or compensation allowed to defendant company for its services in soliciting orders and contracts for the sale and delivery of said automobiles is the sum of twenty per cent of the list price, as set forth in said contract Exhibit "A," and defendant receives no other compensation or profits from the sale of said automobiles, all expenses of de-

8 fendant being included in said commission.

9th. In order that a fair and just conclusion may be arrived at as respects the question involved in this case, neither of the parties hereto attaches any significance to the use of the words "Dealer" or "Agent" whatever the same may appear in said contract Exhibit "A".

Prior to May 1st, 1907, Frank L. Blair, Appraiser of mercantile taxes in and for the county of Allegheny, rated said defendant as a Retail Vendor of goods, wares and merchandise within the provisions of the Act of May 2nd, 1899, P. L. 184, and has assessed defendant company's business for the year 1907, at the sum of $351020.00 and thereupon assessed and levied a license tax against said defendant for the year commencing the first day of May, 1907, as a Retail Vendor or Dealer in goods wares and merchandise, under the provisions of the Act aforesaid of $854.00, which includes the legal fees.

That in addition thereto, the said Mercantile Appraiser has fur-

ther assessed the defendant as a Merchandise Broker, within the meaning of the Act of April 14th, 1905, P. L. 161, and assessed a license tax thereon against the defendant of $2107.62, based on total receipts from commissions, allowances, abatements, etc., in
9 the transaction of its business, provided by said Act of 1905; said license tax including legal costs and fees.

It is agreed that the assessments or ratings aforesaid, as to commissions, are correct, and no question is raised as to the amount of the same, only as to the liability of the defendant to be so rated, assessed or taxed as a Retail Vendor or Dealer, or Merchandise Broker. It is also agreed that the legal formalities as to appeal from the assessment, rating, etc., have been complied with by the defendant, and that the said tax has been duly returned by the Mercantile Appraiser or County Treasurer, and it is agreed that this case be decided as though it were before the court on appeal from the rating and assessment of the Mercantile Appraiser and County Treasurer, the Commonwealth expressly waiving, for the purposes of this case, any appeal on the part of the defendant from said rating and assessment.

The Commonwealth contends that the defendant is either a Vendor or Dealer in goods, wares and merchandise at retail, within the meaning of the said Act of 1899, or that it is a Merchandise Broker within the meaning of said Act of 1905, while the defendant company contends that it is engaged in interstate commerce, and
10 is not a retail dealer or vendor of goods, wares and merchandise, nor is it to be classed as a Merchandise Broker, and therefore, not liable to the Commonwealth for the tax assessed as aforesaid.

If the court be of opinion that under the facts and circumstances above stated the defendant is liable to be assessed or rated as a Retail Dealer or Vendor in goods, wares and merchandise, within the meaning of the Act of May 2nd, 1899 then judgment to be entered for the Commonwealth in the sum of $354.00; or if the court be of opinion that the defendant company is not a Vendor or Dealer in goods, wares and merchandise as aforesaid, but is a Merchandise Broker, within the meaning of the Act of April 14th, 1905, P. L. 161, and as such, liable to the tax imposed by said act, then judgment to be entered for the Commonwealth in the sum of $2107.62 but, if the court be of opinion that the defendant is not a Vendor or Dealer in goods, wares and merchandise at retail, nor a Merchandise Broker, as aforesaid, but that its business is that of interstate commerce, in consequence of which it is not liable to the tax aforesaid, then judgment to be entered in favor of the defendant; the costs to follow the judgment, and either party reserving the right to appeal from the judgment entered.

COMMONWEALTH OF PENNSYLVANIA,
By GEORGE H. CALVERT,
JAMES M. MAGEE, *Attorneys.*
BANKER BROS. COMPANY,
By E. J. KENT,
HARVEY A. MILLER, *Attorneys.*

11 EXHIBIT "A."

Memorandum of Agreement.

Made between The George N. Pierce Co., called First Party herein and Banker Bros. Co., of Pittsburg, Pa., called Second Party.

The First Party agrees

First. To build for and to sell to second party until October 1st, 1906 (unless this instrument is sooner terminated as agreed), Pierce Automobiles at the following prices:

	List price.	Wholesale price, complete car, catalog equipment.	Wh'l'sl price, Chassis. See note below.
Stanhope, 8 H. P.	$900.00	$720.00	
Great Arrow, 28-32 H. P.			
Tonneau Type	4000.00	3200.00	$2880.00
Suburban and Opera Coach	5000.00	4000.00	
Landaulet	5250.00	4200.00	
Great Arrow, 40-45 H. P.			
Tonneau Type	5000.00	4000.00	3680.00
Suburban and Opera Coach	6000.00	4800.00	
Landaulet	6250.00	5000.00	

12 NOTE.—The chassis is comprised as follows: Running gear and mechanism complete in grey priming coat of paint, including regular tool, lamp and tire equipment. If rear fenders or gasolene tank are not required no allowance will be made.

Subject to such extra charges for tops, accessories, etc. as may be determined when orders are accepted. Deliveries to be F. O. B. Buffalo as soon after orders for delivery are from time to time received, as practicable and as the prior orders of other parties and the first party's business will permit; payment to be made in cash. Such orders to be binding only when entered on order form furnished herewith and duly signed by second party and accepted by first party, same to become a part of this contract.

Second. That during the period ending October 1st, 1906, first party will not enter into any contract with any other party for sale of its automobiles within the following described territory; and that it will not sell or solicit orders for automobiles within such territory during the existence of this agreement, viz.:

13 Lawrence, Butler, Armstrong, Beaver, Allegheny, Westmoreland, Fayette, Washington, Indiana, Greene, Cambria, Mercer Venango and Somerset Counties, State of Pennsylvania. State of Ohio Trumbull, Mahoning, Columbiana, Jefferson, Belmont, West Virginia, Hancock, Brooke, Ohio, Marshall, Wetzell, Marion Monongahela, Harrison and Taylor.

Third. Will grant credit to second party for parts and repairs,

same to be paid for by second party, monthly, not later than the 15th day next succeeding the month in which such credit was incurred. Failure to so pay will cancel such credit privilege and first party, at its option, may cancel this agreement for such reason.

Fourth. To advertise at its option in publication of national circulation to be selected by the first party, and at its option to note in such advertisements that its automobiles are on sale by second party.

Fifth. To supply second party with suitable catalogues and other matter at first party's option.

Sixth. To sell in any unoccupied territory, at wholesale prices, only to those who are regularly engaged in the business of re-
14 tailing with proper facilities, excepting always the stockholders of the George N. Pierce Co.

The second party agrees

First. Accepts the terms and covenants herein expressed.

Second. To use all due diligence to further sales of Pierce Automobiles within the above territory.

Third. Not to sell or offer for sale any Pierce Automobiles outside of above territory unless permission is first applied for and granted by the first party, nor to sell or offer for sale any cars of the current year's models at less than the list price with freight charges added.

Fourth. To promptly pay for all Pierce Automobiles and accessories either by cash payment in advance or by accepting and paying drafts with bills of lading attached at sight on presentation.

Fifth. To promptly pay for all parts and repairs incurred and for which credit is granted, monthly, and not later than the 15th day of the month succeeding.

Sixth. In the event of selling Pierce Automobiles through
15 dealers within said territory, such dealers shall execute a contract with second party substantially conforming to this agreement, and a copy of such contract shall be filed with the first party.

Seventh. In consideration of the fact that the first party has obtained a license under Selden Patent No. 549,160, and is paying a substantial royalty thereunder, and has agreed as a consideration of said license not to contest said patent, directly or indirectly, or aid others in so doing, and in consideration of being supplied with licensed vehicles by the first party under this understanding, second party covenants and agrees with the party of the first part.

(*a*) That it (the second party) will not, during the continuance of this instrument, infringe said patent, nor make sell, keep on hand, or in any manner dispose or deal in, directly or indirectly, any unlicensed vehicles; that is to say, any gasolene automobiles not manufactured under license of said Selden Patent, and

(*b*) That he will not sell, consign or deliver any licensed vehicles purchased from the first party under this instrument to any party making, selling, having on hand or dealing in unlicensed vehicles.

16 Both parties hereto mutually agree

First. That this contract may be terminated by either party upon ten (10) days' notice served by registered mail addressed

to the other at the usual place of business of the party so to be served. In case of cancellation of this agreement the second party may elect to take or not any orders then recorded and accepted by the first party, such election to be served on the first party as above described. Such cancellation, however, shall not be construed to relieve the second party of any indebtedness incurred.

Executed by first party at Buffalo, New York, on the 14th day of October, 1905.

THE GEORGE N. PIERCE CO.
CHARLES CLIFTON, *Treasurer.*

Witness:
—— ——.

Executed by second party at Pittsburg, Pa., on the 12th day of October, 1905.

BANKER BROS. CO.
ARTHUR L. BANKER, *Pres't.*

Witness:
—— ——.

17 *Order Form.*

Order No. —. —— — 190–.

Banker Brothers Company, 239 Diamond St., Pittsburgh, Pa.

Please enter my order for one — motor car with the following specifications:

Style of Type ——.
List or Catalog Price ——.
Finish of Body ——.
Finish of Running Gear ——.
Tires ——.
Date Wanted ——.
Place of Delivery ——.
Remarks ——.

For which I agree to pay list price f. o. b. factory as follows: $— upon the signing of this order, balance upon delivery of said car to me.

(Signed) —— ——,
Street and No. —,
City ——, State ——.

Accepted:
BANKER BROTHERS COMPANY,
By —— ——.

18 No. 796, First Term, 1908. Commonwealth of Pennsylvania vs. Banker Brothers Company. Case stated. Filed Dec. 18, 1907. Rodgers, Blakeley & Calvert, 1651-7 Frick Bldg. Annex, Pittsburgh. On list 2, page 77.

19 In the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania, Fourth Term, 1907.

No. —.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY.

And now, to wit, December 31st, 1907, the case stated as heretofore filed is amended by adding to the averments in the first page of the case, the following:

That in addition to the selling of the automobile known as the Pierce Great Arrow, the defendant company is also engaged in selling three other makes of automobiles, all of which are manufactured outside of the State of Pennsylvania, under contracts similar in their terms to the contract Exhibit "A" attached to the case stated, and at times buys and sells in the state of Pennsylvania, second-hand automobiles of different makes, and sells automobile repairs and supplies as provided in said contracts; that liability as to this business is not in issue in this case.

COMMONWEALTH OF PENNA.,
By J. M. MAGEE,
GEORGE H. CALVERT, *Attorneys.*
BANKER BROTHERS CO.,
By E. J. KENT,
H. A. MILLER, *Att'ys.*

20 No. 796. First Term, 1908. Commonwealth of Pennsylvania vs. Banker Brothers Company. Amendment to Case Stated. Jan'y 3/08. Filed. Rodgers, Blakeley & Calvert, 1651-7 Frick Bldg. Annex, Pittsburgh.

21 In the Court of Common Pleas No. 4 of Allegheny County, First Term, 1908.

No. 796.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS CO.

William B. Kirker, Pro.:

Enter judgment for Pl'f in the above entitled case in sum of three hundred and fifty four (354) dollars & costs, per order of court.

J. M. MAGEE,
Of Counsel for Pl'f.

22 796. First Term, '08. Commonwealth of Penna. v. Banker Bros. Co. Præcipe for Judgment. Filed Feb'y 4, 1908. J. M. Magee, of Counsel for Pl'ff.

23 In the Court of Common Pleas No. 4 of Allegheny County, First Term, 1908.

Case Stated.

No. 796.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY.

Opinion.

CARNAHAN, *J.:*

The defendant is a corporation of the State of Pennsylvania, having its principal office in the city of Pittsburgh. It has a contract with The George N. Pierce Company of Buffalo, New York, by which it engages to sell Pierce automobiles, at certain fixed prices, for a commission of twenty per cent. of the prices at which they are sold, which commission includes all expenses of defendant company. The defendant is limited in its sales to certain territory, which includes Allegheny County. It solicits orders for the purchase of these automobiles, and requires the customer to pay at least ten per cent of the list price, when the order is signed, and
24 the balance on delivery. These payments are made to the defendant company. The customer deals with no other party in the transaction.

When an order for the purchase of a machine is received, the defendant company forwards the original, or a copy of it, to The George N. Pierce Company, at Buffalo, New York, and also the cash so received on account, whereupon the Pierce Company accepts the order and proceeds to manufacture and construct the automobile. When it is finished and ready for shipment, it is shipped to the defendant company, but is not delivered until the defendant company pays to the Pierce Company the balance of the list price, less its commission. Upon delivery to the defendant company, it delivers the car to the customer or purchaser, and collects the balance of the price agreed upon to be paid.

The George N. Pierce Company guarantees directly to the purchaser named in the order, the construction and all workmanship and material of the machine.

The contract between the defendant company and the Pierce Company may be terminated by either party, at any time, upon ten days' notice.

The defendant company has similar contracts with three other automobile companies, of other States, where the machines are manufactured. Orders for these machines are solicited by defend-
25 ant company, and forwarded to the manufacturers, and the machines are shipped, delivered and paid for in the manner above explained.

The defendant company, in addition to the business above described, buys from parties in the State of Pennsylvania and sells in the State of Pennsylvania, second-hand automobiles of various kinds and different manufacturers, and also keeps for sale and sells automobile supplies and materials for repair work.

The Mercantile Appraiser of Allegheny County has rated the defendant company as a retail vender of goods, wares and merchandise, within the provisions of the Act of Assembly of May 2nd, 1899, P. L. 184, the first section of which is as follows:

"SECTION 1. Be it enacted, &c. That from and after the passage of this Act, each retail vender of, or retail dealer in goods, wares and merchandise, shall pay an annual mercantile tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, of business transacted annually. * * *"

Upon a gross business, amounting to $351,020.00, he has levied a license tax of $354.00 for the year commencing the first
26 day of May, 1907, which tax includes the legal fees.

The Mercantile Appraiser has also imposed a tax against the defendant company, as being within the provisions of the amendatory Act of Assembly of April 14th, 1905, P. L. 161, which is as follows:

"That, hereafter, all merchandise brokers and real estate brokers, whether persons, firms or corporations, in each and every city and county of this Commonwealth, shall be required to pay annually, to the use of the Commonwealth, for his, their or its respective commissions, or licenses, granted in pursuance of the several Acts of Assembly now in force, relating to the same, upon his, their or its annual receipts from commissions, discounts, abatements, allowances, or other similar means in the transaction of said business, three per centum."

This tax amounts to $2107.62, which includes legal costs and fees.

The Commonwealth contends that the defendant company is either "a retail vender of, or dealer in goods, wares and merchandise" within the meaning of the Act of 1899, or a merchandise broker, within the meaning of the Act of 1905, and is therefore taxable under one or the other of said Acts.

The defendant company contends that it cannot properly
27 be classed as within the meaning of either of said Acts; and furthermore, that its business is that of interstate commerce, for which the State of Pennsylvania has no right to impose a tax.

The Banker Brothers Company, as between it and the manufacturers, may be their agent. As between it and the purchaser of the automobile, it stands in the relation of seller and buyer. The purchaser buys from Banker Brothers Company, and pays that company. He has no contract with the manufacturing company, nor does he know it, at all, in the transaction. The manufacturing company does not look to the individual purchaser for the price of the machine, nor does it ship to the individual purchaser. On the contrary, the manufacturing company's dealings are solely with Banker Brothers Company to which company it actually sells and

delivers the machine, and from which it actually receives the fixed or list price, less twenty per cent. Banker Brothers Company cannot acquire possession of the machine until it pays for it, and the purchaser cannot acquire possession until Banker Brothers Company gives it, at which time Banker Brothers Company collects from the purchaser the balance of the contract price. In other words, there are two sales of each machine. The manufacturing Company sells to Banker Brothers Company, and Banker
28 Brothers Company sells it to the individual purchaser. The very contract between The George N. Pierce Company and Banker Brothers Company, which appears as a part of the Case Stated, and upon which the defendant company bases its claim of exemption from State taxation, expressly provides that the "first party," (meaning thereby The George N. Pierce Company) shall "build for and sell to second party * * * Pierce automobiles, at the following prices," and that "the second party" (meaning thereby Banker Brothers Company) shall "promptly pay for all Pierce automobiles and accessories, either by cash payment in advance or by accepting and paying drafts with bills of lading attached, at sight, on presentation." Notwithstanding the commission to be paid, it is apparent that both parties agreed to treat each transaction as a sale; and it is also apparent that, notwithstanding the guarantee of "The George N. Pierce Company to the individual purchaser, as to construction, workmanship and material, the parties to this contract did not intend that The George N. Pierce Company should sell to the individual purchaser.

"A dealer, in the popular, and therefore in the statutory, sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again." Norris Brothers versus The Commonwealth, 27 Pa. St. Rep. 494.

29 The defendant company, although it sells at a list price, derives a profit from the sale of each machine. It sells, in each transaction with the individual purchaser, for twenty per cent. more than it buys. In the Case Stated, this profit is referred to as a "discount" or "commission," and so it appears to be considered as between the Pierce Company and Banker Brothers Company; but it is a profit, nevertheless, which Banker Brothers Company receives on each sale so made by it.

We are of opinion that Banker Brothers Company *is* a "retail vender of, or retail dealer in goods, wares and merchandise" within the meaning of the Act of 1899, and is liable for payment of the annual mercantile license tax provided for by that act. This liability attaches, not because of the sales made by the Pierce Company to Banker Brothers Company, but because of the sales made by Bankers Brothers Company to third parties, who are its customers.

In this view of the case, there is no question as to whether the business so taxed is that of inter-state commerce. Clearly it is not.

A merchandise broker is defined in Anderson's Dictionary of Law to be "A broker who negotiates sales of merchandise without having possession or control of it."

30 We are of opinion that Banker Brothers Company is not a merchandise broker within the meaning of the Act of April 14th, 1905, and, therefore, is not liable to taxation under said Act.

The fact that the defendant company buys and sells second-hand automobiles of various kinds is mentioned in the Case Stated, for the purpose of showing the general character of its business. Its liability for a tax on such business is not an issue in this case. Nor is there any question, in this case, of liability for a tax on sales of automobiles of other companies of other States, with which companies defendant has contracts, similar, in their terms, to its contract with The George N. Pierce Company. This class of sales is also mentioned, merely by way of description of defendant's general business.

In the view we take of this case, it is unnecessary to discuss the question whether the defendant company is a general dealer in automobiles, and whether, if such, it is in a position to make good a claim of exemption from State taxation, because some of its business may be with residents of other states.

The parties having agreed that should "the court be of opinion that under the facts and circumstances" set forth in the Case
31 States, "the defendant is liable to be assessed or rated as a retail dealer or vender in goods, wares and merchandise, within the meaning of the Act of May 2nd, 1899, then judgment to be entered for the Commonwealth in the sum of $354.00," with costs, the following Order is made:

Order.

And now, to wit, January 21st, 1908, the Court being of opinion that under the facts set forth in the Case Stated the defendant is a retail vender of, or retail dealer in goods wares and merchandise, within the meaning of the Act of the General Assembly of the State of Pennsylvania, entitled "An Act to provide revenue by imposing a mercantile license tax on venders of, or dealers in goods, wares and merchandise, and providing for the collection of said tax," approved May 2nd, A. D. 1899. it is ordered that judgment be entered in favor of the Commonwealth and against Banker Brothers Company for the sum of $354.00 with costs.

BY THE COURT.

Defendants except, exception allowed. Bill sealed.

BY THE COURT.

32 [Endorsed:] No. 796. First Term. 1908. Commonwealth of Pennsylvania vs. Banker Brothers Company. Opinion and order for judgment. Filed Jan'y 22, 1908.

33 In the Court of Common Pleas No. Four for the County of Allegheny, State of Pennsylvania.

No. 796.

First Term, 1908.

COMMONWEALTH OF PA.
v.
BANKER BROTHERS CO.

Appeal of Banker Bros. Co. from the Judgment of said Court.

Know all men by these presents, That we, W. N. Murray and Arthur Banker as sureties and Banker Bros. Co. as principal are held and firmly bound unto the Commonwealth of Pennsylvania for the use of the Commonwealth of Pa. Appellee aforesaid, in the sum of eight hundred and no/100 ($800.00/100) lawful money of the United States, to be paid to the said Appellee or certain executors, administrators or assigns, being double the said order, judgment or decree or value thereof, and all costs accrued and likely to accrue, to which payment, well and truly to be made and done, we do bind ourselves, our heirs, executors and administrators, and every of them, firmly by these presents.

Sealed with our seals and dated this 8th day of February A. D. 1908.

Whereas Banker Bros. Co. has appealed to the Superior
34 Court of Pennsylvania from the judgment of the Court of Common pleas No. 4 of the County of Allegheny, in the above stated suit or proceeding:

Now, the condition of this obligation is such, that if the said Appellant will prosecute this Appeal with effect, and will pay all costs and damages awarded by the Appellate Court, or legally chargeable against it, then this obligation to be void; otherwise to remain in full force and virtue.

W. N. MURRAY. [SEAL.]
A. L. BANKER. [SEAL.]
BANKER BROS. CO. [SEAL.]

Taken, acknowledged and approved by me.

WM. B. KIRKER, *Pro.*

35 Common Pleas No. 4, First Term, 1908.

No. 796.

COMMONWEALTH OF PA.
VS.
BANKER BROS. CO.

Surety for Appeal in the Sum of $800.00

W. N. Murray and Arthur Banker, being about to become surety in the above entitled case, and being duly — according to law, deposes and says:

1st. We reside at Cor. Grant Boulevard & Bryan & 527 Sheridan, my occupation is —.

2nd. I, W. N. Murray, am the owner of Real Estate in the County of Allegheny, as follows: at Cor. of Grant Boulevard & Bryan St. City of P'gh, Pa.

3rd. The value of said real estate if $50,000 and the rent is $— it is assessed for the purpose of taxation at the value of $—.

4th. There are — encumbrances against the Real Estate as follows: Mtg. of $20,000 00/100 and there are no other judgments or mortgages or encumbrances of any kind except those above named, against the said property.

5th. The title of said Real Estate is in my own name, and the same is not subject to any trust.

36 6th. I obtained the said Real Estate in the year of 1907, and my deed for the same is recorded.

W. N. MURRAY.

Sworn and subscribed before me this 8 day of Feb'y, 1908.

W. B. KIRKER,
Prothonotary.

Is justified.
WM. B. KIRKER, *Prothonotary.*

The above named W. N. Murray as surety in the above case.

No. 796. First Term, 1908. Bond. (Under Sections 6 and 13, Act 1897.) Filed Feb'y 8, 1908. Bond on appeal to the — Court of Penn'a.

37 *Superior Court Docket Entries.*

181.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY, Appellant.

Appeal from Common Pleas No. 4, Allegheny County, at No. 796 of First Term, 1908.

E. J. Kent.
Harvey A. Miller.
Appeal and affidavit filed and Writ exit February 8, 1908.
April 9, 1908, Record and ass'g'ts filed.
April 28, 1908, Argued.
February 26, 1909, Judgment affirmed.

PORTER, *J.*

March 4, 1909, Agreement of Counsel to hold Record until an application for appeal to the Supreme Court is disposed of.
April 2, 1909, Petition for allowance of Appeal to the Supreme Court filed; and also brief filed.
Eo Die.—Petition sent to E. D.
April 10, 1909, Appeal refused.
April 16, 1909, Petition for reargument filed.
April 22, 1909, Reargument refused.
April 23, 1909, Petition presented to Rice, P. J. in Chambers for an order fixing bond for an appeal to the Supreme Court United States filed.
Eo Die.—Order of Rice, P. J. fixing bond in $1000 filed.
38 June 2, 1909, Petition for Writ of Error to United States Supreme Court presented to Holmes, J., in Chambers.
Eo Die.—Writ allowed and filed in Superior Court June 7, 1909 with copy thereof.
Eo Die.—Bond in $1,000 approved by Holmes, J. and bond filed in Superior Court June 7, 1909.
Eo Die.—Citation issued and proof of service filed in Superior Court June 7, 1909.
June 7, 1909, Assignments filed.

39 In the Superior Court of Pennsylvania.

COUNTY OF ALLEGHENY:

Court of Common Pleas No. 4, First Term, 1908.

No. 796.

COMMONWEALTH OF PA.
v.
BANKER BROS. CO.

Enter Appeal on behalf of Banker Brothers Co. from the judgment of the Court of Common Pleas No. 4 of the County of Allegheny.

To George Pearson, Prothonotary of the Superior Court.

E. J. KENT &
HARVEY A. MILLER,
Attorneys for Appellant.

COUNTY OF ALLEGHENY, *ss:*

Arthur Banker, for Appellant being duly sworn saith that the above Appeal is not intended for delay, but because the Appellant believes it has suffered injustice by the judgment from which it appeals.

A. L. BANKER.

Sworn and subscribed, this 8th day of February A. D. 1908.
GEORGE PEARSON, *Prothonotary.*

40 [Endorsed:] No. 181, April Term, 1908. Superior Court of Pennsylvania. Commonwealth of Pennsylvania vs. Banker Brothers Co. Appellant. Appeal and Affidavit. Filed Feb. 8, 1908. Superior Court, Fifth District. E. J. Kent, Harvey A. Miller, Attorneys for Appellant.

41 THE SUPERIOR COURT OF PENNSYLVANIA,
County of Allegheny, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas, No. Four for the County of Allegheny, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of Banker Brothers Company from the judgment of your said Court at No. 796 of First Term A. D. 1908 wherein Commonwealth of Pennsylvania is Plaintiff and the above named Appellant is Defendant, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Judges of our Superior Court of Pennsylvania, at a Superior Court to be holden at Pittsburgh, the second

Monday of April next, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, Doctor of Laws, President Judge of our said Superior Court at Pittsburgh, the eighth day of February in the year of our Lord one thousand nine hundred and eight.

[Seal of the Superior Court of Pennsylvania.]

GEORGE PEARSON, *Prothonotary.*

42 [Endorsed:] No. 796 First Term 1908. No. 181 of April Term, 1908. Superior Court. Commonwealth of Pennsylvania v. Banker Brothers Co. Appellant. Certiorari to the Court of Common Pleas, No. 4 for the County of Allegheny. Returnable the second Monday of April A. D. 1908. Rule on the Appellee, to appear and plead on the Return-day of the Writ. George Pearson, Prothonotary. E. J. Kent, Harvey A. Miller, Attorney- for Appellant.

To the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, sitting at Pittsburgh:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

(Signed) BY THE COURT. [L. S.]
T. D. CARNAHAM. [L. S.]
J.

43 In the Superior Court of Pennsylvania, Western District, April Term, 1908.

No. 181.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY, Appellant.

Specifications of Error.

1. The Court erred in not treating Banker Brothers Company as the agent of The George N. Pierce Company of Buffalo New York, as this fact was agreed upon in the case stated.

2. The Court erred in not holding the transaction, under Exhibits A. and B. as agreed to in the case stated, involves interstate commerce, and therefore, appellant cannot be held liable for state tax under the Act of May 2, 1899.

3. The Court erred in its effort to state the facts as the facts were agreed upon, and conclusions of law only remained to be found by the court.

4. The court erred in making the following order:

44 "And now, to wit: January 21st, 1908, the court being of the opinion that under the facts set forth in the case stated, the defendant is a retail vender of, or retail dealer in goods, wares and merchandise, within the meaning of the Act of the General Assembly of the State of Pennsylvania, entitled 'An Act to provide revenue by imposing a mercantile license tax on venders of, or dealers in, goods, wares and merchandise, and providing for the collection of said tax,' approved May 2nd A. D. 1899, it is ordered that judgment be entered in favor of the Commonwealth and against Banker Brothers Company, defendant, for the sum of $354.00, with costs.

BY THE COURT."

being the order on which the judgment for $354.00 and costs was entered.

E. J. KENT AND
HARVEY A. MILLER,
Att'ys for Appellant.

45 No. 181 April Term, 1908. Commonwealth of Pennsylvania vs. Banker Brothers Company, Appellant. Specifications of Error. Filed Apr. 9, 1908, Superior Court, Fifth District. E. J. Kent 523 Farmers' Bank Bldg., Harvey A. Miller, 433 Fifth Avenue, Attorneys for Appellant.

46 In the Superior Court of Pennsylvania, April Term, 1908.

No. 181.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY.

Appeal C. P. No. 4, Allegheny Co. Filed February 26, 1909.

PORTER, *J.:*

The parties agreed upon a case stated in the court below under the provisions of which this is to be considered as an action of assumpsit brought by the Commonwealth to recover of the defendant company the taxes upon its sales of merchandise as a retail dealer, under the provisions of the act of May 2nd 1899, P. L. 184, and, also, for the license tax upon the defendant, as a merchandise broker, under the provisions of the act of May 14th, 1905, P. L. 161. The court below, being of opinion that the defendant was a retail vendor of goods, wares and merchandise as defined by the act of May 2nd, 1899 entered judgment against the defendant in the sum of $354.00 and refused to enter judgment for the tax upon defendant as a merchandise broker. The defendant appeals. The only question is whether certain sales made by the defendant were subject to the tax imposed by the act of May 2nd, 1899. The ap-

pellant contends that the imposition of the tax, in so far as
47 based upon the sales in question, was in violation of that provision of the Constitution of the United States vesting in congress the "power to regulate commerce with foreign nations and among the several states."

The counsel for appellant contend in their brief, as they did upon the oral argument, that the court below fell into error in considering all the facts which has been embodied in the case stated. The case stated contained among other agreements the following, viz: "That Banker Brothers Company, defendant above named, is a corporation organized and existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburg, and is engaged, inter alia, in the business of selling an automobile known under the name of the Pierce Great Arrow, which automobile is manufactured in the City of Buffalo, State of New York, by the George N. Pierce Company, a corporation of the State of New York located in the city and state aforesaid, and the defendant is the exclusive agent and representative of the said George N. Pierce Company for the Pittsburgh territory, as specifically described and mentioned in the contract entered into between the said George N. Pierce Company and the defendant, a copy of which is hereto attached, made a part hereof and marked exhibit "A." "That the said contract marked Exhibit "A." is the genuine existing contract between the George N. Pierce Company of Buffalo, N. Y.
48 and the defendant company, and is the basis of the existing relations and dealings between the said parties thereto, and of the right of the said defendant to sell said automobile in said Pittsburgh territory." The learned counsel argue that this particular part of the written agreement, as to facts in the case stated, involved a conclusive agreement that the relation between the Pierce Company and the defendant was that of principal and agent, and that the defendant company was nothing more to its customers than the agent for the George N. Pierce Company, and that it was not in the power of the court below to go beyond this fragment of the case stated and consider any other fact therein agreed upon or the contracts thereto attached and made part thereof, in determining what was the actual character of the business involved in the sales made by the appellant within the State of Pennsylvania. In thus attempting to escape from the legal results of the other facts and the contracts which had been embodied in the case stated and to confine the inquiry to a fragment of the agreement, the learned counsel seem to lose sight of the fact that, while the fragment upon which they rely does state that "the defendant is the exclusive agent and representative of the George N. Pierce Company for the Pittsburgh territory," it does not state that the sales in question were made as the agent of the Pierce Company, nor does an implication that the sales were so made
49 necessarily arise from the facts stated in that part of the agreement upon which they seem to rely. The contract exhibit "A" which was attached to and made part of the case stated was thus incorporated for the purpose of showing the relations and

dealings between the defendant corporation and the George N. Pierce Company and the character in which the defendant corporation made sales of automobiles in the Pittsburgh territory. It was the duty of the court below, as it is of this court, to examine that contract and consider all the facts agreed upon in the case stated in order to properly determine the real character of the sales made by this Pennsylvania corporation in the State of Pennsylvania and to citizens of Pennsylvania.

The contract between the appellant corporation and the Pierce Company is one which in its form, purpose and effect is not unusual in modern times. The Pierce Company, a manufacturing corporation of the State of New York, under the provisions of this agreement contracted to sell automobiles to the defendant, a Pennsylvania corporation, at prices for each type of automobile twenty per cent below the "list price" for the respective types, deliveries to be F. O. B. Buffalo as soon after orders for delivery were from time to time received as practicable and as the prior orders of other parties and the Pierce Company's business would permit; payment to be made in cash. The Pierce Company agreed not to enter into any contract with any other party for the sale of its automo-
50 biles within the designated territory and not to solicit orders for automobiles within such territory during the existence of the agreement; and it further agreed to grant credit to the Pennsylvania corporation for parts of automobiles and repairs, the same to be paid for not later than the fifteenth day of the month succeeding that in which the credit was incurred. The defendant corporation contracted to use due diligence to further the sale of Pierce automobiles within the designated territory, not to sell such automobiles outside of the said territory without permission, and not to sell or offer for sale any cars of the current year's model at less than the list price, with freight charges added. It agreed to pay for all such automobiles "either by cash payment in advance or by accepting and paying drafts with bills of lading attached at sight on presentation." It agreed to pay for all parts of machines and repairs for which credit was granted monthly, not later than the fifteenth day of the month succeeding. The contract contained a provision that it might be terminated by either party upon ten days' notice, and "In case of cancellation of this agreement the second party may elect to take or not any orders then recorded and accepted by the first party, * * *. Such cancellation, however, shall not be construed to relieve the second party of any indebtedness incurred." The contract does not contain one word which authorizes the defendant company to enter into any contract on behalf of or bind the Pierce Company by any engagement with any
51 third party. This was a contract for the sale of automobiles and did not create between the parties the relation of principal and *a* agent. The Pierce Company, a manufacturer, secured by this contract a responsible purchaser for the product of its factory and made it to the interest of that purchaser, the sale of such product, within the designated territory, by a liberal discount from the list price, thus enabling the purchaser to sell at a profit. The

contract secured to the purchaser, this defendant, a clear field for the sale of the goods that he bought through the operation of the covenant that the manufacturer would not sell to others within the same territory. When this defendant, a Pennsylvania corporation paod the sight draft with bill of lading attached and took possession of an automobile when it arrived, that car, then in Pennsylvania, became the absolute exclusive property of this Pennsylvania corporation. The Banker Brothers Company could then have sold such cars to any person at any place, and for any price that to them was satisfactory, and the purchaser would have taken a good title. The Pierce Company might have canceled their contract with the defendant, in case the latter sold an automobile at less than the list price or outside of the designated territory, in violation of the covenants of the contract, or in case they were able to show actual damage they might possibly have maintained an action for a breach of the contract, but the defendant company could have made a valid sale which would have passed the title to the automobile.

Having by the above recited contract made sure of a source of supply the defendant company was in position to carry on
52 the business of selling automobiles. The case stated sets forth the manner in which such sales were made. The sales were solicited and made by and through demonstrations of said machines by means of demonstrating cars of the same type as that offered for sale, owned and used and always on hand for such purpose only, by the defendant company. The defendant company does not solicit orders and does not make sales outside of the territory designated by this contract with the Pierce Company, and sells only at the "list price." When a customer determines to buy a machine he signs an order upon the form Exhibit "B" attached to and made part of the case stated. This order is addressed to Banker Brothers, the defendant corporation, and in it the purchaser agrees to buy an automobile of a type, style and finish designated in the order, at the list price, F. O. B. factory and to pay in cash an amount then agreed upon and the balance upon delivery of the car to him. The order is then accepted by Banker Brothers Company and constitutes the contract between the defendant corporation and those to whom they make sales. The defendant company in this contract of sale covenants in its own right. The contract contains no suggestion that the defendant corporation is acting as the agent for the Pierce Company or any other person or corporation, nor does it contain anything from which an inference could be drawn that it was in the matter acting as an agent or repre-
53 sentative. The purchaser becomes bound to Banker Brothers only and acquires no rights, under this contract, against any other person or corporation. In case the automobile is not delivered to the customer according to the terms of the contract his only remedy would be against Banker Brothers Company, this defendant corporation. In case a purchaser declined to accept an automobile when it was tendered according to the terms of the contract, the only person who, under this contract, would have a remedy against such purchaser would be this defendant. These sales

are sales by the defendant corporation, in its own right, and not as the agent of the Pierce Company.

When the defendant company had thus secured a contract for the sale of an automobile, it forwarded to the Pierce Company an order for a car of the type desired, together with the cash payment; the Pierce Company shipped the car, when ready, consigning it to the defendant company with bill of lading and sight draft on defendant company attached for the balance of the price, twenty per cent less than the list price, at which the defendant company was entitled to the car under the terms of its contract with the Pierce Company. The defendant company paid the sight draft and took possession of the car, and then delivered it to the purchaser and collected from him the balance of the amount, which under his contract he agreed to pay upon such delivery.

54 The facts set forth in the case stated clearly establish that the defendant corporation was a dealer, which bought automobiles from a factory located in New York, that the goods were by the manufacturer shipped to the defendant company which paid for them before receiving them into its possession, and which under the terms of its contract and the manner in which the shipment was made was required to pay for them before it was entitled to possession. When the defendant company had paid for and obtained possession of a car it in turn delivered it to the purchaser, as required by its own contract with that purchaser, and upon such delivery it collected from the purchaser the money which was its own due. The defendant company is, so far as this particular business is concerned, one who buys to sell again, and is, within the meaning of the act of 1899 a retail vender of merchandise and subject to the tax imposed by that act on such business. The sale made by the Pierce Company to the defendant corporation in view of the manner in which the contract is executed, involves interstate commerce, and down until the time the automobile comes into the possession of the defendant company in Pennsylvania the transaction is within the protection of the Constitution of the United States. The sales which the Pennsylvania corporation makes to citizens of Pennsylvania and

55 which are completed by a delivery to the purchaser in Pennsylvania, of cars which had become the property of the Pennsylvania corporation, are subject to the taxing power of the state.

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property and amendable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are;" Robbins v. Shelby County, 120 U. S. 501; Brown v. Houston, 114 U. S. 635; Emert v. Missouri, 156 U. S. 320; American Steel & Wire Co. v. Speed, 192 U. S. 521; Diamond Match Company v. Village, 188 U. S. 96; General Oil Company v. Crain, 209 U. S. 211. If, therefore, the tax imposed by the act of 1899 be regarded as a tax upon property, it was one which the state had power to impose. Should the tax be regarded as a tax upon a

trade, or the business of vending merchandise, as it in Pennsylvania has been held to be, Knisely v. Cotterel, 196 Pa. 614; Commonwealth v. Bailey et al., 20 Pa. Superior Ct. 210, then the power of the state to impose such a tax is sustained by the decision of the Supreme Court of the United States in Ficklen v. Shelby County, 145 U. S. 1.

The judgment is affirmed.

56 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary, of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth vs. Banker Brothers Company at No. 181 of April Term, 1909, as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, this 26th day of February in the year of our Lord one thousand nine hundred and nine.

[Seal of the Superior Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] No. 181. April Term, 1909. Commonwealth vs. Banker Brothers Company. Exemplification.

57 In the Superior Court of Pennsylvania, Western District, April Term, 1908.

No. 181.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY.

Agreement of Counsel.

And now,—to wit, this 3rd day of March, 1909, it is hereby agreed between counsel for the Commonwealth of Pennsylvania and Banker Brothers' Company, the parties in the above entitled case, that the record shall not be remitted to the Prothonotary of the Court of Com-

mon Pleas of Allegheny County until an application for appeal to the Supreme Court is disposed of.

GEORGE H. CALVERT,
Of Counsel for Com. of Penna.
HARVEY A. MILLER,
Of Counsel for Banker Bros. Co.

58 No. 181. April Term, 1908. Commonwealth of Pennsylvania vs. Banker Brothers' Company. Agreement of Counsel. Filed Mar. 4, 1909. Superior Court, Fifth District.

59 In the Superior Court of Pennsylvania, Western District, April Term, 1908.

No. 181.

COMMONWEALTH OF PENNSYLVANIA, Appellee,
vs.
BANKER BROTHERS COMPANY, a Pennsylvania Corporation, Appellant.

Application for Reargument.

To the President Judge and Judges of said Court:

Banker Brothers Company, Appellant, by their counsel, having at all times due deference and regard for the opinions of your Honorable Court, respectfully request your Honorable Court to grant a re-argument of this case, for the following reasons:

First. Counsel respectfully suggest, that a careful study of the opinion of your Honorable Court in this case, leads them to the inevitable conclusion that the Court has either been misled by the arguments or has misunderstood the fair meaning of the facts and
60 the contract Exhibit "A" as set forth in the case stated, according to the agreement and intention of the parties to the case stated.

Second. The opinion of your Honorable Court shows, that in reaching the conclusion you did, you overlooked or disregarded the fact that the parties to the case stated, had agreed upon a construction or interpretation of the said contract marked Exhibit "A", and their agreement as to the nature of the relation of the parties to it, as they understood it, was that Banker Brothers Company, the appellant, was the agent of the George N. Pierce Company in the Pittsburgh territory and the George N. Pierce Company of Buffalo, New York was their Principal, and it was neither the duty of the Court below, nor of your Honorable Court upon the appeal to go beyond the agreement of the parties and the construction and interpretation placed upon the contract by themselves; and it is only by ignoring this part of the agreement of the parties in their case stated, that the conclusion of your Honorable Court could possibly be reached, by any stretch of legal logic.

Third. By further examination of the opinion, we find the impression your Honorable Court had of the case, was that it no where appeared in the case or the case stated that "The sales in
61 question were made as the Agent of the Pierce Company, nor does an implication that the sales were so made necessarily arise from the facts stated" which is an entirely erroneous impression, as by reference to the Order Form marked Exhibit "B" attached to the case stated, it is clearly and expressly shown that the customer directs the Appellant as Agent of the Pierce Company to "Please enter my order for one motor car with the following specifications, etc. for which I agree to pay list price f. o. b. factory etc."; and your Honorable Court in this case is referred to paragrapns A, B, C, D, E, F, G, H, and I of the case stated, pages 3, 4 and 5 of Appellant's Paper Book and particularly paragraphs 3, 4, 5, 6, and 7 of the case stated, Appellant's paper book page 5.

Fourth. But for the sake of argument, assuming your Honorable Court to be correct in its judgment as to the relation existing between Appellant and George N. Pierce Company being that of Manufacturer on the one hand and purchaser on the other; yet if the sale and delivery of the machine to the customer was f. o. b. cars Buffalo as it was beyond doubt, and as the Order Form Exhibit "B" and the stipulation of facts show, the title passed to the purchaser outside of the State of Pennsylvania, and the automobile did not become the property of Banker Brothers Company at any time, and was therefore not mingled with the taxable property of Pennsylvania.
62 Banker Bros. never kept a stock on hand nor did they maintain any ware-house.

Fifth. Banker Brothers Company under the stipulation of facts and the law were "Del Credere agents". This principle of the law of agency was not called to the attention of your Honorable Court upon the former argument with sufficient emphasis and we believe it is a legal phase of this case of sufficient weight and importance to deserve your further consideration.

Sixth. Appellant did not cite in its Paper Book the case of Rearick v. Pennsylvania 203 United States 507, reversing your Honorable Court in said case as reported at 26 Superior Court 384. As it was then a recent case, and it did not come to our notice in time to include same in the paper book, we respectfully submit, that if counsel had cited this case it might have had an important bearing upon the opinion of your Honorable Court, as the principles of law and facts involved are in many respects similar to those in this case. For instance, among other things the United States Supreme Court holds, to wit:

"Where orders are given for goods sold in a state by the agent of a person employed to solicit them in another state, and the purchaser is not bound to pay for the goods until delivery and
63 unless according to sample, the goods sent specifically to the customer in fulfillment of such orders are, until actually delivered, within the protection of the commerce clause of the Constitution, and a municipal ordinance requiring a license fee for the solicitation of orders for delivering goods not of the party's own

manufacture is void as an interference with interstate commerce against such an agent."

Wherefore: Counsel respectfully request your Honorable Court to grant them a further opportunity to present more clearly their views of the law and facts of this case, as they believe they can do if another chance is given them. It is of the greatest importance, their being a large number of businesses and many thousands of dollars involved in the final decision of this case.

All of which is respectfully submitted.

E. J. KENT,
HARVEY A. MILLER,
Attorneys for Appellant.

64 In the Superior Court of Pennsylvania, April Term, 1908.

No. 181.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY.

Appeal C. P. No. 4 Allegheny Co. Filed February 26, 1909.

PORTER, *J.*:

The parties agreed upon a case stated in the court below under the provisions of which this is to be considered as an action of assumpsit brought by the Commonwealth to recover of the defendant company the taxes upon its sales of merchandise, as a retail dealer, under the provisions of the act of May 2nd 1899, P. L. 184, and, also, for the license tax upon the defendant, as a merchandise broker, under the provisions of the act of May 14th, 1905, P. L. 161. The court below, being of opinion that the defendant was a retail vendor of goods, wares and merchandise as defined by the act of May 2nd, 1899 entered judgment against the defendant in the sum of $354.00 and refused to enter judgment for the tax upon defendant as a merchandise broker. The defendant appeals. The only question is whether certain sales made by the defendant were subject to the tax imposed by the act of May 2nd, 1899. The appellant contends that the imposition of the tax, in so far
65 as based upon the sales in question, was in violation of that provision of the Constitution of the United States vesting in congress the "power to regulate commerce with foreign nations and among the several states."

The counsel for appellant contend in their brief, as they did upon the oral argument, that the court below fell into error in considering all the facts which has been embodied in the case stated. The case stated contained among other agreements the following, viz: "That Banker Brothers Company, defendant above named, is a corporation organized and existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, and is en-

gaged, inter alia, in the business of selling an automobile known under the name of the Pierce Great Arrow, which automobile is manufactured in the City of Buffalo, State of New York, by the George N. Pierce Company, a corporation of the State of New York located in the city and state aforesaid, and the defendant is the exclusive agent and representative of the said George N. Pierce Company for the Pittsburgh territory, as specifically described and mentioned in the contract entered into between the said George N. Pierce Company and the defendant, a copy of which is hereto attached, made a part hereof and marked exhibit "A." "That the said contract marked Exhibit "A," is the genuine existing contract between the George N. Pierce Company of Buffalo, N. Y. and
66 the defendant company, and is the basis of the existing relations and dealings between the said parties thereto, and of the right of the said defendant to sell said automobile in said Pittsburgh territory." The learned counsel argue that this particular part of the written agreement, as to facts in the case stated, involved a conclusive agreement that the relation between the Pierce Company and the defendant was that of principal and agent, and that the defendant company was nothing more to its customers than the agent for the George N. Pierce Company, and that it was not in the power of the court below to go beyond this fragment of the case stated and consider any other fact therein agreed upon or the contracts thereto attached and made part thereof, in determining what was the actual character of the business involved in the sales made by the appellant within the State of Pennsylvania. In thus attempting to escape from the legal results of the other facts and the contracts which had been embodied in the case stated and to confine the inquiry to a fragment of the agreement, the learned counsel seem to lose sight of the fact that, while the fragment upon which they rely does state that "the defendant is the exclusive agent and representative of the George N. Pierce Company for the Pittsburgh territory," it does not state that the sales in question were made as the agent of the Pierce Company, nor does an implication that the sales were so made necessarily arise from the facts stated in
67 that part of the agreement upon which they seem to rely. The contract exhibit "A" which was attached to and made part of the case stated was thus incorporated for the purpose of showing the relations and dealings between the defendant corporation and the George N. Pierce Company and the character in which the defendant corporation made sales of automobiles in the Pittsburgh territory. It was the duty of the court below, as it is of this court, to examine that contract and consider all the facts agreed upon in the case stated in order to properly determine the real character of the sales made by this Pennsylvania corporation in the State of Pennsylvania and to citizens of Pennsylvania.

The contract between the appellant corporation and the Pierce Company is one which in its form, purpose and effect is not unusual in modern times. The Pierce Company, a manufacturing corporation of the State of New York, under the provisions of this agreement contracted to sell automobiles to the defendant, a Pennsyl-

vania corporation, at prices for each type of automobile twenty per cent below the "list price" for the respective types, deliveries to be F. O. B. Buffalo as soon after orders for delivery were from time to time received as practicable and as the prior orders of other parties and the Pierce Company's business would permit; payment to be made in cash. The Pierce Company agreed not to enter into any
contract with any other party for the sale of its automobiles
68 within the designated territory and not to solicit orders for
automobiles within such territory during the existence of the agreement; and it further agreed to grant credit to the Pennsylvania corporation for parts of automobiles and repairs, the same to be paid for not later than the fifteenth day of the month succeeding that in which the credit was incurred. The defendant corporation contracted to use due diligence to further the sale of Pierce automobiles within the designated territory, not to sell such automobiles outside of the said territory, without permission, and not to sell or offer for sale any cars of the current year's model at less than the list price, with freight charges added. It agreed to pay for all such automobiles "either by cash payment in advance or by accepting and paying drafts with bills of lading attached at sight on presentation." It agreed to pay for all parts of machines and repairs for which credit was granted monthly, not later than the fifteenth day of the month succeeding. The contract contained a provision that it might be terminated by either party upon ten days' notice, and "In case of cancellation of this agreement the second party may elect to take or not any orders then recorded and accepted by the first party, * * *. Such cancellation, however, shall not be construed to relieve the second party of any indebtedness incurred." The contract does not contain one word which authorizes the defendant company to enter into any contract on behalf of
or bind the Pierce Company by any agreement with any
69 third party. This was a contract for the sale of automobiles
and did not create between the parties the relation of principal and *a* agent. The Pierce Company, a manufacturer, secured by this contract a responsible purchaser for the product of its factory and made it to the interest of that purchaser to further the sale of such product, within the designated territory, by a liberal discount from the list price, thus enabling the purchaser to sell at a profit. The contract secured to the purchaser, this defendant, a clear field for the sale of the goods that he bought through the operation of the covenant that the manufacturer would not sell to others within the same territory. When this defendant, a Pennsylvania corporation paid the sight draft with bill of lading attached and took possession of an automobile when it arrived, that car, then in Pennsylvania, became the absolute exclusive property of this Pennsylvania corporation. The Banker Brothers Company could then have sold such cars to any person at any place, and for any price that to them was satisfactory, and the purchaser would have taken a good title. The Pierce Company might have cancelled their contract with the defendant, in case the latter sold an automobile at less than the list price or outside of the designated territory,

in violation of the covenants of the contract, or in case they were able to show actual damage they might possibly have maintained an action for a breach of the contract, but the defendant company could have made a valid sale which would have passed the title to the automobile.

Having by the above recited contract made sure of a source of supply the defendant company was in position to carry
70 on the business of selling automobiles. The case stated sets forth the manner in which such sales were made. The sales were solicited and made by and through demonstrations of said machines by means of demonstrating cars of the same type as that offered for sale, owned and used and always on hand for such purpose only, by the defendant company. The defendant company does not solicit orders and does not make sales outside of the territory designated by this contract with the Pierce Company, and sells only at the "list price." When a customer determines to buy a machine he signs an order upon the form Exhibit "B" attached to and made part of the case stated. This order is addressed to Banker Brothers, the defendant corporation, and in it the purchaser agrees to buy an automobile of a type, style and finish designated in the order, at the list price, F. O. B. factory and to pay in cash an amount then agreed upon and the balance upon delivery of the car to him. The order is then accepted by Banker Brothers Company and constitutes the contract between the defendant corporation and those to whom they make sales. The defendant company in this contract of sale covenants in its own right. The contract contains no suggestion that the defendant corporation is acting as the agent for the Pierce Company or any other person or corporation, nor does it contain anything from which an inference could be drawn that it was in the matter acting as an agent or representative. The
71 purchaser becomes bound to Banker Brothers only and acquires no rights, under this contract, against any other person or corporation. In case the automobile is not delivered to the customer according to the terms of the contract his only remedy would be against Banker Brothers Company, this defendant corporation. In case a purchaser declined to accept an automobile when it was tendered according to the terms of the contract, the only person who, under this contract, would have a remedy against such purchaser would be this defendant. These sales are sales by the defendant corporation, in its own right, and not as the agent of the Pierce Company.

When the defendant company had thus secured a contract for the sale of an automobile, it forwarded to the Pierce Company an order for a car of the type desired, together with the cash payment; the Pierce Company shipped the car, when ready, consigning it to the defendant company with bill of lading and sight draft on defendant company attached for the balance of the price, twenty per cent less than the list price, at which the defendant company was entitled to the car under the terms of its contract with the Pierce Company. The defendant company paid the sight draft and took possession of the car, and then delivered it to the purchaser and

collected from him the balance of the amount, which under his contract he agreed to pay upon such delivery.

72 The facts set forth in the case stated clearly establish that the defendant corporation was a dealer, which bought automobiles from a factory located in New York, that the goods were by the manufacturer shipped to the defendant company which paid for them before receiving them into its possession, and which under the terms of its contract and the manner in which the shipment was made was required to pay for them before it was entitled to possession. When the defendant company had paid for and obtained possession of a car it in turn delivered it to the purchaser, as required by its own contract with that purchaser, and upon such delivery it collected from the purchaser the money which was its own due. The defendant company is, so far as this particular business is concerned, one who buys to sell again, and is, within the meaning of the act of 1899 a retail vender of merchandise and subject to the tax imposed by that act on such business. The sale made by the Pierce Company to the defendant corporation in view of the manner in which the contract is executed, involves interstate commerce, and down until the time the automobile comes into the possession of the defendant company in Pennsylvania the transaction is within the protection of the Constitution of the United States. The sales which the Pennsylvania corporation makes to citizens of Pennsylvania and which are completed by a delivery to the

73 purchaser in Pennsylvania, of cars which had become the property of the Pennsylvania corporation, are subject to the taxing power of the state.

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are;" Robbins v. Shelby County, 120 U. S. 501; Brown v. Houston, 114 U. S. 635; Emert v. Missouri, 156 U. S. 320; American Steel & Wire Co. v. Speed, 192 U. S. 521; Diamond Match Company v. Village, 188 U. S. 96; General Oil Company v. Crain, 209 U. S. 211. If, therefore, the tax imposed by the act of 1899 be regarded as a tax upon property, it was one which the state had power to impose. Should the tax be regarded as a tax upon a trade, or the business of vending merchandise, as it in Pennsylvania has been held to be, Knisely v. Cotterel, 196 Pa. 614; Commonwealth v. Bailey et al, 20 Pa. Superior Ct. 210, then the power of the state to impose such a tax is sustained by the decision of the Supreme Court of the United States in Ficklen v. Shelby County, 145 U. S. 1.

The judgment is affirmed.

74 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary, of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct

copy of the whole and entire opinion in the case of Commonwealth vs. Banker Brothers Company at No. 181 of April Term, 1908, as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, this sixteenth day of April in the year of our Lord one thousand nine hundred and nine.

[Seal of the Superior Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary.

75 [Endorsed:] No. 181. April Term, 1908. Commonwealth of Pennsylvania vs. Banker Brothers Company, appellant. Exemplification.

76 In the Superior Court, Pa. Western Dist. No. 181, April Term, 1908. Commonwealth of Pennsylvania, Appellee, vs. Banker Brothers Company, Appellant. Petition for Reargument. Filed Apr. 13, 1908. Superior Court, Fifth District. Harvey A. Miller, E. J. Kent, Attorney- at Law, Attorneys for Appellant.

77 In the Superior Court of Pennsylvania, April Term, 1908.

No. 181.

COMMONWEALTH
v.
BANKER BROTHERS COMPANY, Appellant.

Appeal from Common Pleas No. Four, Allegheny County.

And now, to wit, April 22, 1909, the petition for reargument is refused.

BY THE COURT.

78 No. 181, April Term, 1908. Commonwealth vs. Banker Brothers Company, Appellant. Order Filed Apr. 22, 1909. Superior Court, Fifth District.

79 In the Supreme Court of Pennsylvania, — Term, 1909.

No. —.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS' COMPANY, a Pennsylvania Corporation.

Sur. No. 181, April Term, 1908, in the Superior Court of Pennsylvania.

Application for Leave to Appeal from the Decision of the Superior Court of Penn'a to the Supreme Court of Pennsylvania.

To the Chief Justice and Justices of the said Court:

The application of Banker Brothers' Company, a corporation of the State of Pennsylvania, respectfully repre ents:

First. That the decision of the Superior Court of Pennsylvania in the above entitled case on February 26, 1909, affirming the decision of the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania, upon a case stated, involves the application of Article I, Section 8, of the Constitution of the United States, as follows:

"The congress shall have power to regulate commerce with
80 foreign nations and among the several states and with the Indian tribes. Purd. Dig. (13th Ed.) Vol. I, page 10, Sec. 26.

Second. As will appear by the facts in the case stated, the question before the Court was to determine whether (under the aforesaid provision of the Constitution of the United States) automobiles manufactured in states other than the State of Pennsylvania (as in this case), and delivered to the individual Pennsylvania purchaser thereof f. o. b. cars at Buffalo, pursuant to the orders solicited and obtained by defendant by the use of demonstrating cars in Pennsylvania, which orders when obtained by defendant in Pennsylvania are submitted with the cash payment to the factory at Buffalo, New York, to be filed, and the automobiles thereafter manufactured, is interstate commerce, and not liable to mercantile tax by the State of Pennsylvania; or whether the defendant so dealing is a retail vendor or dealer in goods, wares and merchandise, subject to said tax, within the meaning of the Act of May 2, 1889, P. L. 184, Section 1, which Act provides as follows:

"Be it enacted, etc., that from and after the passage of this act, each retail vendor of or retail dealer in goods, wares and merchandise shall pay an annual mercantile tax of Two dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole value, gross, of business transacted annually."

81 Third. An exemplification of the opinion of the said Superior Court is hereto attached and made a part of this application.

Fourth. Submitted herewith is also a copy of each of the paper

books used by the appellee and appellant respectively in the appeal to said Superior Court.

Fifth. Counsel for appellant also submit herewith a brief specification directing the attention of your Honorable Court to some of the main points concerning which, we believe, the Superior Court was in error.

Banker Brothers' Company, appellant, therefore prays Your Honorable Court for leave to appeal the above entitled case to be heard before Your Honorable Court;

And it will ever pray, etc.,

BANKER BROTHERS' COMPANY,
By E. J. KENT AND
HARVEY A. MILLER,
Its Attorneys.

ALLEGHENY COUNTY, *ss:*

Before me, the undersigned authority, personally appeared E. J. Kent of counsel for Banker Brothers' Company in the
82 above stated case, who being duly sworn according to law, depo:es and says the foregoing allegations are peculiarly within his knowledge, and that the same are true and correct.

E. J. KENT.

Sworn and subscribed before me this 2nd day of April, 1909.

GEO. PEARSON, *Pro.*

83 **In the Superior Court of Pennsylvania, April Term, 1908.**

No. 181.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS COMPANY.

Appeal C. P. No. 4, Allegheny. Filed February 26, 1909.

PORTER, *J.:*

The parties agreed upon a case stated in the court below under the provisions of which this is to be considered as an action of assumpsit brought by the Commonwealth to recover of the defendant company the taxes upon its sales of merchandise as a retail dealer, under the provisions of the act of May 2nd, 1899, P. L. 184, and, also, for the license tax upon the defendant as a merchandise broker, under the provisions of the act of May 14th, 1905, P. L. 161. The court below, being of opinion that the defendant was a retail vender of goods, wares and merchandise as defined by the act of May 2nd, 1899 entered judgment against the defendant in the sum of $354.00 and refused to enter judgment for the tax upon defendant as a merchandise broker. The defendant appeals. The only question

is whether certain sales made by the defendant were subject to the tax imposed by the act of May 2nd, 1899. The appellant contends that the imposition of the tax, in so far as based upon the sales in question, was in violation of that provision of the Constitu-
84 tion of the United States vesting in Congress the "power to regulate commerce with foreign nations and among the several states."

The counsel for appellant contend in their brief, as they did upon the oral argument, that the court below fell into error in considering all the facts which has been embodied in the case stated. The case stated contained among other agreements the following, viz.: "That Banker Brothers Company, defendant above named, is a corporation organized and existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, and is engaged, inter alia, in the business of selling an automobile known under the name of the Pierce Great Arrow, which automobile is manufactured in the City of Buffalo, State of New York, by the George N. Pierce Company, a corporation of the State of New York located in the city and state aforesaid, and the defendant is the exclusive agent and representative of the said George N. Pierce Company for the Pittsburgh territory, as specifically described and mentioned in the contract entered into between the said George N. Pierce Company and the defendant, a copy of which is hereto attached, made a part hereof and marked exhibit "A." "That the said contract, marked exhibit "A," is the genuine existing contract between the George N. Pierce Company of Buffalo, N. Y. and the defendant company, and is the basis of the existing relations and dealings between the said parties thereto, and of the right of the said defendant to sell said automobile in said Pittsburgh territory." The learned counsel argue that this particular
85 part of the written agreement, as to facts in the case stated, involved a conclusive agreement that the relation between the Pierce Company and the defendant was that of principal and agent, and that the defendant company was nothing more to its customers than the agent for the George N. Pierce Company, and that it was not in the power of the court below to go beyond this fragment of the case stated and consider any other fact therein agreed upon or the contracts thereto attached and made part thereof, in determining what was the actual character of the business involved in the sales made by the appellant within the State of Pennsylvania. In thus attempting to escape from the legal results of the other facts and the contracts which had been embodied in the case stated and to confine the inquiry to a fragment of the agreement, the learned counsel seem to lose sight of the fact that, while the fragment upon which they rely does state that "the defendant is the exclusive agent and representative of the George N. Pierce Company for the Pittsburgh territory," it does not state that the sales in question were made as the agent of the Pierce Company, nor does an implication that the sales were so made necessarily arise from the facts stated in that part of the agreement upon which they seem to rely. The contract exhibit "A" which was attached

to and made part of the case stated was thus incorporated for the purpose of showing the relations and dealings between the defendant corporation and the George N. Pierce Company and the character in which the defendant corporation made sales of automobiles
86 in the Pittsburgh territory. It was the duty of the court below, as it is of this court, to examine that contract and consider all the facts agreed upon in the case stated in order to properly determine the real character of the sales made by this Pennsylvania corporation in the State of Pennsylvania and to citizens of Pennsylvania.

The contract between the appellant corporation and the Pierce Company is one which in its form, purpose and effect is not unusual in modern times. The Pierce Company, a manufacturing corporation of the State of New York, under the provisions of this agreement contracted to sell automobiles to the defendant, a Pennsylvania Corporation, at prices for each type of automobile twenty per cent below the "list price" for the respective types, deliveries to be F. O. B. Buffalo as soon after orders for delivery were from time to time received as practicable and as the prior orders of other parties and the Pierce Company's business would permit; payment to be made in cash. The Pierce Company agreed not to enter into any contract with any other party for the sale of its automobiles within the designated territory and not to solicit orders for automobiles within such territory during the existence of the agreement; and it further agreed to grant credit to the Pennsylvania corporation for parts of automobiles and repairs, the same to be paid for not later than the fifteenth day of the month succeeding that in which the credit was incurred. The defendant corporation contracted to use due diligence to further the sale of Pierce automobiles within the designated territory, not to sell such
87 automobiles outside of the said territory, without permission, and not to sell or offer for sale any cars of the current year's model at less than the list price, with freight charges added. It agreed to pay for all such automobiles "either by cash payment in advance or by accepting and paying drafts with bills of lading attached at sight on presentation." It agreed to pay for all parts of machines and repairs for which credit was granted monthly, not later than the fifteenth day of the month succeeding. The contract contained a provision that it might be terminated by either party upon ten days' notice, and "In case of cancellation of this agreement the second party may elect to take or not any orders then recorded and accepted by the first party, * * *. Such cancellation, however, shall not be construed to relieve the second party of any indebtedness incurred." The contract does not contain one word which authorizes the defendant company to enter into any contract on behalf of or bind the Pierce Company by any engagement with any third party. This was a contract for the sale of automobiles and did not create between the parties the relation of principal and agent. The Pierce Company, a manufacturer, secured by this contract a responsible purchaser for the product of its factory and made it to the interest of that purchaser to further, the sale of such

product, within the designated territory, by a liberal discount from the list price, thus enabling the purchaser to sell at a profit. The contract secured to the purchaser, this defendant, a clear
88 field for the sale of the goods that he bought through the operation of the covenant that the manufacturer would not sell to others within the same territory. When this defendant, a Pennsylvania corporation paid the sight draft with bill of lading attached and took possession of an automobile when it arrived, that car, then in Pennsylvania, became the absolute exclusive property of this Pennsylvania corporation. The Banker Brothers Company could then have sold such cars to any person at any place, and for any price that to them was satisfactory, and the purchaser would have taken a good title. The Pierce company might have cancelled their contract with the defendant, in case the latter sold an automobile at less than the list price or outside of the designated territory, in violation of the covenants of the contract, or in case they were able to show actual damage they might possibly have maintained an action for a breach of the contract, but the defendant company could have made a valid sale which would have passed the title to the automobile.

Having by the above recited contract made sure of a source of supply the defendant company was in position to carry on the business of selling automobiles. The case stated sets forth the manner in which such sales were made. The sales were solicited and made by and through demonstrations of said machines by means of demonstrating cars of the same type as that offered for sale, owned and used and always on hand for such purpose only, by the defendant company. The defendant company does not solicit
89 orders and does not make sales outside of the territory designated by this contract with the Pierce Company, and sells only at the "list price." When a customer determines to buy a machine he signs an order upon the form Exhibit "B," attached to and made part of the case stated. This order is addressed to Banker Brothers, the defendant corporation, and in it the purchaser agrees to buy an automobile of a type, style and finish designated in the order, at the list price, F. O. B. factory; and to pay in cash an amount then agreed upon and the balance upon delivery of the car to him. The order is then accepted by Banker Brothers Company and constitutes the contract between the defendant corporation and those to whom they make sales. The defendant company in this contract of sale covenants in its own right. The contract contains no suggestion that the defendant corporation is acting as the agent for the Pierce Company or any other person or corporation, nor does it contain anything from which an inference could be drawn that it was in the matter acting as an agent or representative. The purchaser becomes bound to Banker Brothers only and acquires no rights, under this contract, against any other person or corporation. In case the automobile is not delivered to the customer according to the terms of the contract his only remedy would be against Banker Brothers Company, this defendant corporation. In case a purchaser declined to accept an automobile when it was tendered

according to the terms of the contract, the only person who, under this contract, would have a remedy against such purchaser
90 would be this defendant. These sales are sales by the defendant corporation, in its own right, and not as the agent of the Pierce Company.

When the defendant company had thus secured a contract for the sale of an automobile, it forwarded to the Pierce Company an order for a car of the type desired, together with the cash payment; the Pierce Company shipped the car, when ready, consigning it to the defendant company with bill of lading and sight draft on defendant company attached for the balance of the price, twenty per cent less than the list price, at which the defendant company was entitled to the car under the terms of its contract with the Pierce Company. The defendant company paid the sight draft and took possession of the car, and then delivered it to the purchaser and collected from him the balance of the amount, which under his contract he agreed to pay upon such delivery.

The facts set forth in the case stated clearly establish that the defendant corporation was a dealer, which bought automobiles from a factory located in New York, that the goods were by the manufacturer shipped to the defendant company which paid for them before receiving them into its possession, and which under the terms of its contract and the manner in which the shipment was made was required to pay for them before it was entitled to possession. When the defendant company had paid for and obtained possession of a car it in turn delivered it to the purchaser, as required by its own contract with that purchaser, and upon such de-
91 livery it collected from the purchaser the money which was its own due. The defendant company is, so far as this particular business is concerned, one who buys to sell again, and is, within the meaning of the act of 1899 a retail vender of merchandise and subject to the tax imposed by that act on such business. The sale made by the Pierce Company to the defendant corporation in view of the manner in which the contract is executed, involves interstate commerce, and down until the time the automobile comes into the possession of the defendant company in Pennsylvania the transaction is within the protection of the Constitution of the United States. The sales which the Pennsylvania corporation makes to citizens of Pennsylvania and which are completed by a delivery to the purchaser in Pennsylvania, of cars which had become the property of the Pennsylvania corporation, are subject to the taxing power of the state.

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property and amendable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are;" Robbins v. Shelby County, 120 U. S. 501; Brown v. Houston, 114 U. S. 635; Emert v. Missouri, 156 U. S. 320; American Steel & Wire Co. v. Speed, 192 U. S. 521; Diamond Match Company v. Village, 188 U. S. 96; General Oil

Company v. Crain, 209 U. S. 211. If, therefore, the tax imposed by the act of 1899 be regarded as a tax upon property, it
92 was one which the state had power to impose. Should the tax be regarded as a tax upon a trade, or the business of vending merchandise, as it in Pennsylvania has been held to be, Knisely v. Cotterel, 196 Pa. 614; Commonwealth v. Bailey et al., 20 Pa. Superior Ct. 210, then the power of the state to impose such a tax is sustained by the decision of the Supreme Court of the United States in Ficklin v. Shelby County, 145 U. S. 1.

The judgment is affirmed.

93 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary, of the Supreme Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth of Pennsylvania vs. Banker Brothers Company, at No. 181 of April Term, 1908, as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsburgh, in the County of Allegheny, this third day of March, in the year of our Lord one thousand nine hundred and nine.

[Seal of the Superior Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary.

94 [Endorsed:] No. 181, April Term, 1908. Commonwealth of Pennsylvania vs. Banker Brothers Company, Appellant Exemplification.

95 In the Supreme Court of Pennsylvania, — Term, 1909.

No. —.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS' COMPANY, a Pennsylvania Corporation.

Sur No. 181, April Term, 1908, in the Superior Court of Penna.

Brief for Leave to Appeal.

To the Chief Justice and Justices of said Court:

Counsel for Banker Brothers' Company, applicant for leave to appeal the above entitled case to Your Honorable Court, contend that the same should be allowed for the following reasons:

First. Because the Superior Court fell into the same error as did the Court below by placing a different construction upon the agreed facts than the construction agreed upon between the parties in the case stated; for instance, the parties, interalia, agreed, "That the defendant (Banker Brothers Company) is the exclusive agent and representative of the George N. Pierce Company for the Pittsburgh territory, as specifically described and mentioned in the contract entered into between the said George N. Pierce Company and the defendant, a copy of which is hereto attached and made a part
96 hereof, marked "Exhibit A." "That the said contract, marked "Exhibit A" is the genuine existing contract between the George N. Pierce Company of Buffalo, New York, and the defendant company, and is the basis of the existing relations and dealings between the said parties thereto and of the right of the said defendant to sell said automobiles in said Pittsburgh territory." Whereas the Superior Court in its opinion, page 3, after quoting part of the agreed facts as to the agency, says, "It does not state that the sales in question were made as the agent of the Pierce Company, nor does the implication that the sales were so made necessarily arise from the facts stated in that part of the agreement upon which they seem to rely." This is absolutely an erroneous conclusion, for the parties have agreed that the contract under which the business was transacted was a contract of agency. That this conclusion is erroneous will be further seen by reference to pages 3 and 4 of appellant's paper book, as well as order attached, Exhibit B, (see appellant's paper book, page 13) for Exhibit B is the order form used by the agent in soliciting purchasers, which when signed, is submitted to the principal, the George N. Pierce Company, and could not become a contract until accepted by said George N. Pierce Company.

97 Second. The court in its opinion further finds, "When a customer determines to buy a machine, he signs an order upon form Exhibit B, attached to and made a part of the case stated. This order is addressed to Banker Brothers, the defendant, and in

it the purchaser agrees to buy an automobile of the type, style and finish designated in the order, at the list price f. o. b. factory, and to pay in cash the amount then agreed upon, and the balance upon delivery of the car to him." The court here overlooks the important fact that in the case stated (see appellant's paper book, page 4,) it is agreed as follows: "Defendant company thereupon forwards said order, together with said cash payment, to the George N. Pierce Company at Buffalo, New York, where said order is accepted, and is listed in the order in which it is received, and the said George N. Pierce Company then proceed to the manufacture of the automobile so ordered;" which clearly shows the transaction to be one between the George N. Pierce Company and the individual purchaser.

Third. The Court must concede the delivery to the purchaser f. o. b. cars at Buffalo, New York. The Court further say, "The sale made by the Pierce Company to the defendant corporation, in view of the manner in which the contract is executed, involves interstate commerce, and down until the time the automobile
98 comes into the possession of the defendant company in Pennsylvania, the transaction is within the protection of the Constitution of the United States." The court concedes the transaction involves interstate commerce. The court must concede the delivery to the purchaser (not to the defendant company) f. o. b. cars at Buffalo, New York. Yet in the face of these facts, the court say the sale is one by the Pierce Company to the defendant, which conclusion is absolutely inconsistent and contradictory, and contrary to the agreed facts.

Fourth. The fact that the defendant, as agent for the George N. Pierce Company, delivers the car to the purchaser and collects the balance of the purchase money, puts defendant company in the position only of guaranteeing collections as a "del credere" agent, as defined in Anderson's Law Dictionary, page 333, as "An agent or factor who guarantees that the persons to whom he sells will perform the contracts he makes with them." Duguid et al. v. Edwards et al., 50 Barb. (U. S.) 295; Story on Agency, Section 33.

Fifth. That the case under consideration is one falling within the protection of the Constitution of the United States, we respectfully call the court's attention to the case of Rearick v. Pennsylvania, 203 U. S. 507, reversing the Superior Court of Pennsylvania in
99 the case reported in 26 S. C. 384, the principles involved in said case being in many respects similar to those in the case under consideration, as follows:

"Where orders are given for goods sold in a state by the agent of a person employed to solicit them in another state and the purchaser is not bound to pay for the goods until delivery and unless according to sample, the goods sent specifically to the customer in fulfillment of such orders are, until actually delivered, within the protection of the commerce clause of the Constitution, and a municipal ordinance requiring a license fee for the solicitation of orders for delivering goods not of the party's own manufacture is void as an interference with interstate commerce against such an agent."

In conclusion, it is urged that from the fact that the decision of

this case affects a great many automobile companies conducting business in a similar manner, whose rights and liabilities as to a mercantile tax will depend upon the decision in this case, it should, therefore, be passed upon by your Honorable Court.

Respectfully submitted.

E. J. KENT,
HARVEY A. MILLER,
Attorneys for Defendant.

100 No. —, — Term, 1909. Commonwealth of Pennsylvania vs. Banker Brothers' Company, a Pennsylvania Corporation. Brief for leave to appeal. Filed Apr. 2, 1909. Supreme Court W. D. E. J. Kent & Harvey A. Miller Attys. for Appellant, Farmers Bank Bldg. & Frick Bldg. Pittsburg.

101 No. —, — Term, 1909. Commonwealth of Pennsylvania vs. Banker Brothers Company, a Pennsylvania Corporation. April 10, 1909. Application for leave to appeal from the Decision of the Superior Court to the Supreme Court. Filed Apr. 2 1909. Supreme Court, W. D. April 10, 1909. Appeal refused Per Curiam. E. J. Kent & Harvey A. Miller Attys. for appellant Farmers Bank Bldg. & Frick Bldg. Pittsburg, Pa.

102 **In the Superior Court of Pennsylvania, Western District, April Term, 1908.**

No. 181.

COMMONWEALTH OF PENNSYLVANIA, Appellee,
vs.
BANKER BROTHERS' COMPANY, Appellant.

Application for Fixing of Bail in the Matter of Appeal to the Supreme Court of the United States.

To the President Judge of the Superior Court:

The petition of Banker Brothers' Company, appellant, by its counsel, Harvey A. Miller and E. J. Kent, respectfully represents:

That the appellant desires to take an appeal in this case from the judgment of Your Honorable Court to the Supreme Court of the United States, and respectfully requests the President Judge of Your Honorable Court to fix the amount of bail in accordance with the practice in such cases made and provided, in order
103 that execution be stayed for the period of sixty days, and in the event of such appeal being allowed, until the same is finally determined.

Counsel respectfully suggest the amount of the judgment, interest and costs in this case will not exceed the sum of Five Hundred

Dollars ($500.00), and therefore suggests the amount of the bond be fixed in the sum of One thousand dollars ($1,000.00).

All of which is respectfully submitted.

E. J. KENT,
HARVEY A. MILLER,
Counsel for Appellant.

104 *Order of Court.*

And now, to wit, this 23rd day of April, 1909, the within petition having been duly presented, the amount of said bond is fixed at the sum of One thousand dollars, in accordance with the above petition.

CHARLES E. RICE,
President Judge.

105 No. 181. April Term, 1908. Commonwealth of Pennsylvania, Appellee vs. Banker Brothers' Company, Appellant. Order of Court fixing Bond for Appeal to the Supreme Court of the United States. Filed Apr. 23, 1909. Superior Court, Fifth District. Harvey A. Miller 702 Frick Bldg., Pgh. Pa. E. J. Kent, Farmers Bank Bldg., Pgh., Counsel for Appellant.

106 In the Supreme Court of the United States, Sitting at Washington, D. C.

No. —.

COMMONWEALTH OF PENNSYLVANIA,
vs.
BANKER BROTHERS COMPANY, Appellant.

Assignments of Error.

Now comes Banker Brothers Company, a corporation, and in connection with the petition for a Writ of Error filed herein, respectfully submits that in the record, proceedings, decision and final judgment of the Superior Court of the State of Pennsylvania in the above entitled matter, there is manifest error in this—to wit:

First. The Superior Court erred in not reversing the Court of Common Pleas No. 4 of Allegheny County upon the following:

Specifications of Error.

"First. The court erred in not treating Banker Brothers Company as the agent of the George N. Pierce Company of
107 Buffalo, New York, as this fact was agreed upon in the case stated.

Second. The Court erred in not holding the transaction, under Exhibits A and B, and as agreed to in the case stated, involves

inter-state commerce, and, therefore, appellant cannot be held liable for state tax under the act of May 2, 1899.

Third. The court erred in its effort to state the facts as the facts were agreed upon, and conclusions of law only remained to be found by the court.

Fourth. The Court erred in making the following order:

And now, to wit, January 21st, 1909, the court being of the opinion that under the facts set forth in the case stated, the defendant is a retail vendor of, or retail dealer in goods, wares and merchandise, within the meaning of the Act of the General Assembly of the State of Pennsylvania, entitled, 'An Act to provide revenue by imposing a mercantile license tax on vendors of, or dealers in goods, wares and merchandise, and providing for the collection of said tax,' approved May 2nd, A. D. 1899, it is ordered that judgment be entered in favor of the Commonwealth and against Banker Brothers Company, defendant, for the sum of $354.00, with costs.

BY THE COURT.

Being the order on which the judgment for $354.00 and costs was entered.

108 Second. The Superior Court erred in its apprehension of counsel's contention in holding "The counsel for appellant contend in their belief, as they did in the oral argument, that the Court below fell into error in considering all the facts which have been embodied in the case stated," and in holding as follows: "In their attempting to escape from the legal results of the other facts and the contracts which had been embodied in the case stated, and to confine the inquiry to a fragment of the agreement, the learned counsel seem to lose sight of the facts that, while the fragment upon which they rely does state that "the defendant is the exclusive agent and representative of the George N. Pierce Company for the Pittsburgh territory," it does not state that the sales in question were made as the agent of the Pierce Company, nor does an implication that the sales were so made necessarily arise from the facts stated in that part of the agreement upon which they seem to rely."

Third. The Superior Court erred in holding "The Pierce Company, a manufacturing corporation of the State of New York, under the provisions of this agreement contracted to sell automobiles to the defendant, a Pennsylvania Corporation, at prices for each type of automobile twenty per cent below the 'list price' for the
109 respective types, deliveries to be F. O. B. Buffalo, as soon after orders for delivery were from time to time received as practicable and as the prior orders of other parties and the Pierce Company's business would permit; payment to be made in cash."

Fourth. The Superior Court erred in holding "The contract does not contain one word which authorizes the defendant company to enter into any contract on behalf of or bind the Pierce Co. by any engagement with any third party. This was a contract for the sale of automobiles and did not create between the parties the relation of principal and agent. The Pierce Co., a manufacturer, secured

by this contract a responsible purchaser for the product of its factory, and made it to the interest of that purchaser to further the sale of such product, within the designated territory, by a liberal discount from the list price, thus enabling the purchaser to sell at a profit. The contract secured to the purchaser, this defendant, a clear field for the sale of the goods that he bought through the operation of the covenant that the manufacturer would not sell to others within the same territory. When this defendant, a Pennsylvania corporation, paid the sight draft with bill of lading attached and took possession of an automobile when it arrived, that car, then in Pennsylvania, became the absolute exclusive property of this Pennsylvania corporation. The Banker Brothers Company
110 could then have sold such cars to any person at any place, and for any price that to them was satisfactory, and the purchaser would have taken a good title."

Fifth. The Superior Court erred in holding "When a customer determines to buy a machine he signs an order upon the form exhibit "B" attached to and made part of the case stated. This order is addressed to Banker Brothers, the defendant corporation, and in it the purchaser agrees to buy an automobile of a type, style and finish designated in the order, at the list price, F. O. B. factory; and to pay in cash an amount then agreed upon and the balance upon delivery of the car to him. The order is then accepted by Banker Brothers Company and constitutes the contract between the defendant corporation and those to whom they make sales. The defendant company in this contract of sale covenants in its own right. The contract contains no suggestion that the defendant corporation is acting as the agent for the Pierce Company or any other person or corporation, nor does it contain anything from which an inference could be drawn that it was in the matter acting as an agent or representative. The purchaser becomes bound to Banker Brothers only and acquires no rights, under this contract, against any other person or corporation. In case the automobile is not delivered to
111 the customer according to the terms of the contract his only remedy would be against Banker Brothers Company, the defendant corporation. In case a purchaser declined to accept an automobile when it was tendered according to the terms of the contract, the only person who, under this contract, would have a remedy against such purchaser would be this defendant. These sales are sales by the defendant corporation, in its own right, and not as the agent of the Pierce Company."

Sixth. The Superior Court erred in holding "The facts set forth in the case stated clearly establish that the defendant corporation was a dealer, which bought automobiles from a factory located in New York."

Seventh. The Superior Court erred in holding "The defendant company is, so far as this particular business is concerned, one who buys to sell again, and is, within the meaning of the act of 1899 a retail vender of merchandise and subject to the tax imposed by that act on such business. The sale made by the Pierce Company to the defendant corporation in view of the manner in which the contract

is executed, involves interstate commerce, and down until the time the automobile comes into the possession of the defendant company in Pennsylvania, the transaction is within the protection of the Constitution of the United States. The sales which the Pennsylvania corporation makes to citizens of Pennsylvania, and which
112 are completed by a delivery to the purchaser in Pennsylvania, of cars which had become the property of the Pennsylvania corporation are subject to the taxing power of the state.

Eighth. The Superior Court erred in affirming and in not reversing the Court of Common Pleas No. 4 of Allegheny County, and in not holding the transaction covered by the facts in the case stated, is one involving interstate commerce, and is protected by the State of Pennsylvania from taxation by Article I, Section 8, Clause 3, of the Constitution of the United States which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and the Indian tribes."

Ninth. The Superior Court erred in affirming and in not reversing the judgment of the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania.

Tenth. That for the errors herein assigned, Banker Brothers Company, plaintiff in error, therefore prays Your Honorable Court to reverse the judgment of the Superior Court of Pennsylvania in affirming and in not reversing said Court of Common Pleas No. 4 of Allegheny County, Pennsylvania, and to enter judgment for plaintiff in error accordingly.

E. J. KENT,
HARVEY A. MILLER,
Attorneys for Plaintiff in Error.

113 No. —. Commonwealth of Pennsylvania, Appellee, vs. Banker Brothers Company, Appellant. Assignments of error. Filed June 7, 1909. Superior Court. E. J. Kent, Farmers Bank Bldg., P'gh. Harvey A. Miller, 702 Frick Bldg., P'gh, Attorneys for Appellant.

114 In the Supreme Court of the United States, October Term, 1909.

No. —.

BANKER BROTHERS COMPANY, a Corporation of the State of Pennsylvania, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Petition to the Supreme Court of the United States for Writ of Error.

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States:

The Petition of Banker Brothers Company, respectfully showeth: That Petitioner brought suit in the Superior Court of Pennsyl-

vania, for the Western District, to April Term 1908 No. 181 on an Appeal from the judgment of the Court of Common Pleas No. Four of Allegheny County, in which suit, in said Superior Court, your Petitioner was Appellant and the Commonwealth of Pennsylvania was Appellee.

That suit was brought in said Court of Common Pleas No. Four in and for said County of Allegheny, by the Commonwealth of Pennsylvania as Plaintiff against Banker Brothers Company (your Petitioner) as Defendant at No. 796, First Term 1908, for the collection of $354.00 being the sum of Mercantile Tax assessed and levied by said Commonwealth upon the amount of the gross business of defendant. The facts of the case, as agreed upon by the parties, were submitted to said Common Pleas Court for its opinion,
in form of case-stated, and which involved the application
115 of Article 1, Section 8, Clause 3 of the Constitution of the United States as follows:

"The Congress shall have power to regulate commerce with for-
"eign nations, among the several states and with Indian tribes."

And also of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that,

"No state shall make or enforce any law which shall abridge the
"privilege or immunities of citizens of the United States, nor shall
"any state deprive any person of life, liberty, or property without
"due process of law, nor deny to any person within its jurisdiction
"the equal protection of the laws."

As to the regulation of Inter-State Commerce, between a manufacturer of New York State, and its agents in the sale of the manufactured articles in Pennsylvania, the question submitted to the said Court for its determination being: Whether, automobiles manufactured by the George N. Pierce Company in the city of Buffalo, state of New York, and shipped f. o. b. cars Buffalo in the name of Petitioner, as agent for the Pierce Company for delivery to the individual purchasers of said automobiles in Pennsylvania, (pursuant to Orders for said automobiles solicited and obtained by Petitioner, the exclusive agent and representative of said George N. Pierce Company for the Pittsburgh Territory, and which Orders when solicited and obtained by Petitioner in Pennsylvania are forwarded with the cash payment or hand-money to said George N. Pierce at Buffalo, N. Y., for acceptance and filing, and the automobiles so ordered, thereafter manufactured) is interstate commerce and not liable to Mercantile Tax by the state of Pennsylvania; or whether Banker Brothers Company the defendant in the Court below, so soliciting and forwarding the Orders to their Principal as aforesaid is a retail vendor or dealer in goods, wares or merchandise, and subject to said
Tax, within the meaning of the Act of Assembly of Penn-
116 sylvania passed May 2nd, 1889, P. L. of Pa. Page —, Section 1, which Act provides as follows:

"Be it enacted, etc., that from and after the passage of this Act,
"each retail vendor of or retail dealer in goods, wares or merchandise
"shall pay an annual mercantile tax of $2.00 and all persons so

"engaged shall pay one mill additional on each dollar of the whole 'gross of business transacted annually."

That upon consideration thereof the said Court entered the following order:

"And now, towit, January 21, 1908, the Court being of the "opinion that under the facts set forth in said case the defendant "is a retail vendor of or dealer in goods, wares and merchandise "within the meaning of the Act of the General Assembly of the "State of Pennsylvania, entitled 'An Act to provide revenue by im-"posing a mercantile tax on vendors or dealers in goods, wares and "merchandise and providing for the collection of said taxes,' ap-"proved May 2nd, 1889, it is ordered that judgment be entered in "favor of the Commonwealth and against Banker Brothers Com-"pany, defendant, for the sum of $354.00 with costs.'

And upon which order judgment was entered and recorded against your Petitioner.

That upon the 26th day of February 1909 the Superior Court of Pennsylvania sitting at Philadelphia, having heard your Petitioner's appeal, ordered said judgment of the Court below to be "affirmed," and afterwards on the 26th day of Feb'y 1909 judgment was duly entered and recorded on said order in the Western District of Pennsylvania aforesaid.

That, less than $1500.00 being involved in said suit, said judgment of said Superior Court, is a judgment of the highest Court of record of the Commonwealth of Pennsylvania as to the sum involved, unless Appeal is specially allowed by the Supreme Court of said state.

That on the 2nd day of April 1909 your Petitioner applied to the Supreme Court of Pennsylvania for leave to appeal from the decision of said Superior Court, and by order duly entered and recorded April 10th 1909 allowance of appeal was refused.

117 That, thereupon, on the 16th day of April 1909, your Petitioner applied to said Superior Court for re-hearing and re-argument and by order duly entered and recorded April 22nd 1909 same was refused.

That on the 23rd day of April 1909 upon application of Petitioner to the Honorable, the Chief Justice Charles E. Rice of the Superior Court made an order fixing the Bond of your Petitioner at $1,000.00 for stay of execution for 60 days pending the application of your Petitioner to your Honorable Court for allowance of Writ of Error to said Superior Court.

That said judgment of said Superior Court is final. That the right of the Commonwealth of Pennsylvania under authority of the Act of May 2nd, 1889, aforesaid to assess and levy a Mercantile Tax on Petitioner involves the regulation of Inter-State Commerce and the application of Article 1, Section 8, Clause 3, and Section 1 of the 14th Amendment of the Constitution of the United States as above set forth; your Petitioner contended in the Common Pleas Court, as in the Superior Court and also in petition for Appeal to the Supreme Court of Pennsylvania that upon the agreed facts in the case-stated, it was the exclusive agent and representative of the

George N. Pierce Company of Buffalo, N. Y., and its business in soliciting orders from Pennsylvania purchasers at Pittsburg, Penna., is exempt from Mercantile Tax in Pennsylvania, and that it is not "A dealer or vendor of goods, wares and merchandise;" but its business is that of interstate commerce and is protected from said tax by Article 1, Section 8, Clause 3, and Section 1 of the 14th Amendment of the Constitution of the United States as afore-
118 said, and the right, title, privilege and immunity claimed by your Petitioner in the Common Pleas Court was claimed by it also before the Superior Court as also in the Petition to the Supreme Court of Pennsylvania for the allowance of an appeal.

That the decision and judgment of the Common Pleas Court and of the Superior Court of Pennsylvania aforesaid was against the right, title, privilege and immunity claimed by your Petitioner under said Article 1, Section 8, Clause 3 and Section 1 of the 14th Amendment of the Constitution of the United States.

That nearly all of the automobiles manufactured in the United States are made in states other than in Pennsylvania, and all of the manufactures have agencies or representatives in Pennsylvania, and which agents are assessed and levied upon for Mercantile Tax in the same manner as your Petitioner, but the payment of the Tax and the enforced collection of it is being with-held until the final determination of this case.

Reasons.

First. The Superior Court erred in not reversing the Court of Common Pleas No. Four of Allegheny County upon the following:

"Specifications of Error.

First. The Court erred in not treating Banker Brothers Company as the agent of the George N. Pierce Company of Buffalo, New York, as this fact was agreed upon in the case-stated.

Second. The Court erred in not holding the transaction, under Exhibits A and B and as agreed to in the case stated, involves interstate commerce, and, therefore, Appellant cannot be held liable for state tax under the Act of May 2nd, 1899.

119 Third. The Court erred in its effort to state the facts as the facts were agreed upon, and conclusions of law only remained to be found by the Court.

Fourth. The Court erred in making the following order:

"And now, towit, January 21st, 1909, the Court being of the opinion that under the facts set forth in the case stated, the defendant is a retail vendor or, or retail dealer in goods, wares and merchandise, within the meaning of the Act of the General Assembly of the State of Pennsylvania, entitled 'An Act to provide revenue by imposing a mercantile license tax on vendors of, or dealers in goods, wares and merchandise, and providing for the collection of said tax,' approved May 2d, A. D. 1899, it is ordered that judgment

be entered in favor of the Commonwealth and against Banker Brothers Company, defendant, for the sum of $354.00, with costs.

BY THE COURT."

Being the order on which the judgment for $354.00 and costs was entered.

Second. The Superior Court erred in its apprehension of counsel's contention in holding "The counsel for appellant contend in their *belief,* as they did in the oral argument, that the Court below fell into error in considering all the facts which has been embodied in the case stated," and in holding as follows: "In their attempting to escape from the legal results of the other facts and the contracts which had been embodied in the case stated, and to confine the inquiry to a fragment of the agreement, the learned counsel seem to lose sight of the facts that, while the fragment upon which they rely does state that "the defendant is the exclusive agent and representative of the George N. Pierce Company for the Pittsburg territory," it does not state that the sales in question were made as the agent of the Pierce Company, nor does an implication that the sales were so made necessarily arise from the facts stated in that
120 part of the agreement upon which they seem to rely."

Third. The Superior Court erred in holding "The Pierce company, a manufacturing corporation of the State of New York, under the provisions of this agreement contracted to sell automobiles to the defendant, a Pennsylvania Corporation, at prices for each type of automobile twenty per cent below the 'list price' for the respective types, deliveries to be f. o. b. Buffalo, as soon after orders for delivery were from time to time received as practicable and as the prior orders of other parties and the Pierce Company's business would permit; payment to be made in cash."

Fourth. The Superior Court erred in holding "The contract does not contain one word which authorizes the defendant company to enter into any contract on behalf of or bind the Pierce Co. by any engagement with any third party. This was a contract for the sale of automobiles and did not create between the parties the relation of principal and agent. The Pierce Co., a manufacturer, secured by this contract a responsible purchaser for the product of its factory, and made it to the interest of that purchaser to further the sale of such product within the designated territory, by a liberal discount from the list price, thus enabling the purchaser to sell at a profit. The contract secured to the purchaser, this defendant, a clear field for the sale of the goods that he bought through the operation of the covenant that the manufacturer would not sell to others within the same territory. When this defendant, a Pennsylvania corporation, paid the sight draft with bill of lading attached and took possession of an automobile when it arrived, that car, then in Pennsylvania, became the absolute exclusive property of this Pennsylvania corporation. The Banker Brothers Company could then have
121 sold such cars to any person at any place, and for any price that to them was satisfactory, and the purchaser would have taken a good title."

Fifth. The Superior Court erred in holding "When a customer determines to buy a machine he signs an order upon the form exhibit "B" attached to and made part of the case stated. This order is addressed to Banker Brothers, the defendant corporation, and in it the purchaser agrees to buy an automobile of a type, style and finish designated in the order, at the list price, f. o. b. factory; and to pay in cash an amount then agreed upon and the balance upon delivery of the car to him. The order is then accepted by Banker Brothers Company and constitutes the contract between the defendant corporation and those to whom they make sales. The defendant company in this contract of sale covenants in its own right. The contract contains no suggestion that the defendant corporation is acting as the agent for the Pierce Company or any other person or corporation, nor does it contain anything from which an inference could be drawn that it was in the matter acting as an agent or representative. The purchaser becomes bound to Banker Brothers only and acquires no rights, under this contract, against any other person or corporation. In case the automobile is not delivered to the customer according to the terms of the contract his only remedy would be against Banker Brothers Company, the defendant corporation. In case a purchaser declined to accept an automobile when it was tendered according to the terms of the contract, the only person who, under this contract would have a remedy against such purchaser would be this defendant. These sales are sales by the defendant corporation, in its own right, and not as the agent of the Pierce Company."

Sixth. The Superior Court erred in holding "The facts set forth in the case stated clearly establish that the defendant corpo-
122 ration was a dealer, which bought automobiles from a factory located in New York."

Seventh. The Superior Court erred in holding "The defendant company is, so far as this particular business is concerned, one who buys to sell again, and is, within the meaning of the Act of 1899 a retail vendor of merchandise and subject to the tax imposed by that act on such business. The sale made by the Pierce Company to the defendant corporation in view of the manner in which the contract is executed, involves interstate commerce, and down until the time the automobile comes into the possession of the defendant company in Pennsylvania, the transaction is within the protection of the Constitution of the United States. The sale which the Pennsylvania corporation makes to citizens of Pennsylvania and which are completed by a delivery to the purchaser in Pennsylvania, of cars which had become the property of the Pennsylvania corporation, are subject to the taxing power of the state."

Eighth. The Superior Court erred in affirming and in not reversing the Court of Common Pleas No. 4 of Allegheny County and in not holding the transaction covered by the facts in the case stated is one involving interstate commerce and is protected by the State of Pennsylvania from taxation by Article 1, Section 8 Clause 3 of the constit-ion of the United States which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and the Indian tribes."

Ninth. The Superior Court erred in affirming and in not reversing the judgment of the Court of Common Please No. 4 of Allegheny County.

Your Petitioner adds hereto and makes a part of the averments and allegations of this petition a correct copy of the case-stated agreed upon by the parties in the Court below, and the same submitted to the said Court of Common Pleas No. 4 of Allegheny County for their said opinion.

Wherefore your Petitioner having no other remedy,
123 brings this, its petition, in this court, praying this Honorable Court to order a Writ of Error to issue from this Court, directed to the Superior Court of Pennsylvania, commanding the Judges thereof to send the records of the proceedings aforesaid, and all things concerning the same to the Supreme Court of the United States, at Washington, in order that the errors complained of and the judgment of said Court may be re-examined and reversed or affirmed in the Supreme Court of the United States.

And your Petitioner further prays that your Honors will grant a Supersedeas in this case and direct that the Commonwealth of Pennsylvania shall not proceed to enforce the judgment of the Superior Court of the State of Pennsylvania, and that your Honors will further grant the Plaintiff in Error a reasonable time in which to present in this Court, the transcript of the records of this case, which, when presented shall be filed nunc pro tunc, as if filed with this petition.

And your petitioner will ever pray, etc.

BANKER BROS. CO.,
By I. G. DAVIS, *Treasurer.*

E. J. KENT,
H. A. MILLER,
Attorneys for Plaintiff in Error.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

I. G. Davis, Treasurer of Banker Brothers Company Petitioner named in the foregoing petition, being duly sworn accord-
124 ing to law, deposes and says that the facts and statements as set forth in the foregoing petition are true according to the best of his knowledge, information and belief.

I. G. DAVIS.

Sworn to and subscribed before me this 29th day of May, 1909.

[Seal Alice A. Trill, Notary Public, Pittsburg, Pa.]

ALICE A. TRILL,
Notary Public.

My Commission expires January 16, 1913.

125 Copy.

In the Court of Common Pleas No. 4 of Allegheny County, Pa., First Term, 1908.

No. 796.

COMMONWEALTH OF PENNSYLVANIA
vs.
BANKER BROTHERS CO.

Facts as Agreed Upon.

And now, to-wit: December 18th, 1907, it is hereby agreed that the Prothonotary of said Court shall enter the above suit upon his docket, and that from the time of such entry the said action or suit shall be deemed to be pending in like manner as if the said defendant had appeared to a summons in assumpsit issued against it by the Commonwealth of Pennsylvania.

It is further agreed by and between the said parties that the following case be stated for the opinion of the Court in the nature of a special verdict:

1. Banker Brothers Company, defendant above named, is a corporation organized and existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, and is engaged, inter alia, in the business of selling an automobile known under the name of "Pierce Great Arrow," which automobile is manufactured in the City of Buffalo, State of New York, by the George N. Pierce Company, a corporation of the State of New York, located in the city and state aforesaid, and the defendant is the exclusive agent and representative of the said George N. Pierce Company for the Pittsburgh territory, as specifically de-
126 scribed and mentioned in the contract entered into between said George N. Pierce Company and the defendant, a copy of which is hereto attached, made part hereof and marked Exhibit "A."

That the said contract marked Exhibit "A" is the genuine existing contract between the George N. Pierce Company of Buffalo, New York, and the defendant company, and is the basis of the existing relations and dealings between the said parties thereto and of the right of said defendant to sell said automobile in said Pittsburgh territory.

That by virtue of said contract the defendant company, in the transaction of its business of selling and handling the Pierce Great Arrow automobile, makes sales of the same, as is agreed by the parties hereto, in the manner following:

(*a*) All orders for said automobiles and all sales of same are solicited and made by and through demonstrations of said machines by means of demonstrating cars of the same type as that offered for sale, owned and used and always on hand for such purpose only,

by the defendant company, and which demonstrating cars defendant is required to have and use for such purpose by the George N. Pierce Company.

(*b*) Defendant solicits orders for the purchase of said automobiles from its customers only within the territory described in said contract. That the order is upon an order form of the defendant company, a copy of which is attached hereto, made a part hereof and marked Exhibit "B."

(*c*) Said customers or purchasers in every case specify the color of paint, finish and such special appointments, attachments and features as they may desire.

(*d*) Such order or contract for purchase of said automobiles is solicited and accepted only at the list price as specified by the
127 said George N. Pierce Company, manufacturer, as set forth in said Exhibit "A."

(*e*) Said customer or purchaser immediately upon the signing of said order pays to the defendant company at least ten per cent. of the list price (as set forth in said Exhibit "A") in cash and the balance on delivery.

(*f*) Defendant company thereupon forwards said order or copy of same, together with said cash payment to the George N. Pierce Company at Buffalo, New York, where said order is accepted and is listed in the order in which it is received, and the said George N. Pierce Company then proceeds to the manufacture of the automobile so ordered.

(*g*) Said automobile being completed, defendant company is duly notified by said George N. Pierce Company of the date of shipment of same, and same is accordingly shipped, for the purchaser, in the name of the defendant company with bill of lading and sight draft on defendant company attached, for the balance of the list price due George N. Pierce Company, less a discount of the defendant company's commission of twenty per cent.

(*h*) Defendant then delivers the car to and collects from the purchaser.

(*i*) The George N. Pierce Company guarantees direct to the purchaser their construction of said automobile and all workmanship and material thereon.

2. It is further agreed that the defendant company does not have on hand or at any time carry in stock for sale as part of its business any new or unused "Pierce Great Arrow" automobiles.

3. That defendant has no choice or control whatsoever over the selling price of said automobiles.

128 4. That defendant's right of sale does not extend beyond the territory mentioned in said contract Exhibit "A," and defendant company has no authority to appoint sub-agents or dealers, except by the consent of the George N. Pierce Company and as specified in said contract, Exhibit "A."

5. That all authority pertaining to the sale of said automobiles in the territory specified is retained and exercised by the George N. Pierce Company, who for any violation of the terms of said contract may terminate same upon ten days' notice.

6. That said contract can be terminated by either party at any time upon notice for or without cause.

7. That the discount or commission or compensation allowed to defendant company for its services in soliciting orders and contracts for the sale and delivery of said automobiles is the sum of twenty per cent. of the list price, as set forth in said contract, Exhibit "A," and defendant receives no other compensation or profits from the sale of said automobiles, all expenses of defendant being included in said commission.

8. In order that a fair and just conclusion may be arrived at as respects the question involved in this case, neither of the parties hereto attaches any significance to the use of the words "dealer" or "agent" wherever the same may appear in said contract, Exhibit "A."

Prior to May 1st, 1907, Frank L. Blair, Appraiser of Mercantile Taxes in and for the County of Allegheny, rated said defendant as a retail vendor of goods, wares and merchandise within the provisions of the Act of May 2d, 1899, P. L., 184, and has assessed defendant company's business for the year 1907 at the sum of $351,-
020.00, and thereupon assessed and levied a license tax
129 against said defendant for the year commencing the first day of May 1907, as retail vendor or dealer in goods, wares and merchandise, under the provisions of the Act aforesaid, of $354.00, which includes the legal fees.

That in addition thereto, the said Mercantile Appraiser has further assessed the defendant as a merchandise broker within the meaning of the Act of April 14th, 1905, P. L. 161, and assessed a license tax thereon against the defendant of $2,107.62 based on total receipts from commissions, allowances, abatements, etc., in the transaction of its business, provided by said Act of 1905, said license tax including legal costs and fees.

It is agreed that the assessments or ratings aforesaid, as to commissions, are correct, and no question is raised as to the amount of the same, only as to the liability of the defendant to be so rated, assessed or taxed as a retail vender or dealer, or merchandise broker. It is also agreed that the legal formalities as to appeal from the assessment, rating, etc. have been complied with by the defendant, and that the said tax has been duly returned by the Mercantile Appraiser or County Treasurer, and it is agreed that this case be decided as though it were before the Court on appeal from the rating and assessment of the Mercantile Appraiser and County Treasurer, the Commonwealth expressly waiving, for the purpose of this case, any appeal on the part of the defendant from said rating and assessment.

The Commonwealth contends that the defendant is either a vender or dealer in goods, wares and merchandise at retail, within the meaning of the said Act of 1899, or that it is a merchandise broker
within the meaning of said Act of 1905, while the defendant
130 company contends that it is engaged in inter-state commerce, and is not a retail dealer or vender of goods, wares and merchandise, nor is it to be classed as a merchandise broker, and

therefore not liable to the Commonwealth for the tax assessed as aforesaid.

If the Court be of the opinion that under the facts and circumstances above stated the defendant is liable to be assessed or rated as a retail dealer or vender in goods, wares and merchandise within the meaning of the Act of May 2d, 1899, then judgment to be entered for the Commonwealth in the sum of $354.00; or if the Court be of the opinion that the defendant company is not a vendor or dealer in goods, wares and merchandise as aforesaid, but is a merchandise broker, within the meaning of the Act of April 14th, 1905, P. L., 161, and as such liable to the tax imposed by said Act, then judgment to be entered for the Commonwealth in the sum of $2,107.62; but if the Court be of opinion that the defendant is not a vender or dealer in goods, wares and merchandise at retail, nor a merchandise broker, as aforesaid, but that its business is that of interstate commerce, in consequence of which it is not liable to the tax aforesaid, then judgment to be entered in favor of the defendant; the costs to follow the judgment, and either party reserving the right to appeal from the judgment entered.

COMMONWEALTH OF PENNSYLVANIA,
By GEORGE H. CALVERT,
JAMES M. MAGEE, *Attorneys.*
BANKER BROTHERS COMPANY,
By E. J. KENT,
HARVEY A. MILLER, *Attorneys.*

131 EXHIBIT "A."

Memorandum of Agreement Made Between The George N. Pierce Co., Called First Party Herein, and Banker Bros. Co., of Pittsburg, Pa., Called Second Party.

The first party agrees,

First. To build for and to sell to second party until October 1st, 1906 (unless this instrument is sooner terminated as agreed), Pierce automobiles at the following prices:

	List price.	Wholesale price, complete car, catalog equipment.	Wh'ls'l price Chassis. See note below.
Stanhope, 8 h. p.....	$900.00	$720.00	
Great Arrow, 28-32 h. p.—			
Tonneau Type	4000.00	3200.00	$2,880.00
Suburban and Opera Coach .	5000.00	4000.00	
Landaulet	5250.00	4200.00	
Great Arrow, 40-45 h. p.—			
Tonneau Type	5000.00	4000.00	3,680.00
Suburban and Opera Coach .	6000.00	4800.00	
Landaulet	6250.00	5000.00	

NOTE.—The chassis is comprised as follows: Running gear and mechanism complete in gray priming coat of paint, including regular tool, lamp and tyre equipment. If rear fenders or gasoline tank are not required no allowance will be made.

Subject to such extra charges for tops, accessories, etc., as may be determined when orders are accepted. Deliveries to be f. o. b. Buffalo as soon after orders for delivery are from time to time received as practicable and as the prior orders of other parties and the first party's business will permit; payment to be made in cash. Such orders to be binding only when entered on order form furnished herewith and duly signed by second party and accepted by first party, same to become a part of this contract.

132 Second. That during the period ending October 1st, 1906, first party will not enter into any contract with any other party for sale of its automobiles within the following described territory; and that it will not sell or solicit orders for automobiles within such territory during the existence of this agreement, viz:

Lawrence, Butler, Armstrong, Beaver, Allegheny, Westmoreland, Fayette, Washington, Indiana, Greene, Cambria, Mercer, Venango, and Somerset counties, State of Pennsylvania; State of Ohio—Trumbull, Mahoning, Columbiana, Jefferson, Belmont; West Virginia—Hancock, Brooke, Ohio, Marshall, Wetzel, Marion, Monongahela, Harrison and Taylor.

Third. Will grant credit to second party for parts and repairs, same to be paid for by second party, monthly, not later than the 15th day next succeeding the month in which such credit was incurred. Failure to so pay will cancel such credit privilege, and first party, at its option, may cancel this agreement for such reason.

Fourth. To advertise at its option in publications of national circulation to be selected by the first party, and at its option to note in such advertisements that its automobiles are on sale by second pary.

Fifth. To supply second party with suitable catalogues and other matter at first party's option.

Sixth. To sell in any unoccupied territory, at wholesale prices, only to those who are regularly engaged in the business of retailing, with proper facilities, excepting always the stockholders of the George N. Pierce Co.

The second party agrees,

First. Accepts the terms and covenants herein expressed.

Second. To use all due diligence to further sales of Pierce automobiles within the above territory.

133 Third. Not to sell or offer for sale any Pierce automobiles outside of above territory unless permission is first applied for and granted by the first party, nor to sell or offer for sale any cars of the current year's models at less than the list price, with freight charges added.

Fourth. To promptly pay for all Pierce automobiles and accessories either by cash payment in advance or by accepting and paying drafts with bills of lading attached at sight on presentation.

Fifth. To promptly pay for all parts and repairs incurred and

for which credit is granted, monthly, and not later than the 15th day of the month succeeding.

Sixth. In the event of selling Pierce automobiles through dealers within said territory, such dealers shall execute a contract with second party substantially conforming to this agreement, and a copy of such contract shall be filed with the first party.

Seventh. In consideration of the fact that the first party has obtained a license under Selden patent No. 549,160, and is paying a substantial royalty thereunder, and has agreed as a consideration of said license not to contest said patent, directly or indirectly, or aid others in so doing, and in consideration of being supplied with licensed vehicles by the first party under this understanding, second party covenants and agrees with the party of the first part:

(*a*) That it(the second party) will not, during the continuance of this instrument, infringe said patent, nor make, sell, keep on hand, or in any manner dispose of or deal in, directly or indirectly, any unlicensed vehicles; that is to say, any gasoline automobiles not manufactured under license of said Selden patent, and

(*b*) That he will not sell, consign or deliver any licensed vehicles purchased from the first party under this instrument to any party making, selling, having on hand or dealing in unlicensed vehicles.

134 Both parties hereto mutually agree,

First. That this contract may be terminated by either party upon ten (10) days' notice served by registered mail addressed to the other at the usual place of business of the party so to be served. In case of cancellation of this agreement the second party may elect to take or not any orders then recorded and accepted by the first party, such election to be served on the first party as above described. Such cancellation, however, shall not be construed to relieve the second party of any indebtedness incurred.

Executed by first party at Buffalo, New York, on the 14th day of October, 1905.

THE GEORGE N. PIERCE CO.
CHARLES CLIFTON, *Treasurer.*

Witness:

——— ———.

Executed by second party at Pittsburgh, Pa., on the 12th day of October, 1905.

BANKER BROS. CO.
ARTHUR L. BANKER, *Pres't.*

Witness:

——— ———.

135 EXHIBIT "B."

Order Form.

Order No. —. —— ——, 190–.

Banker Brothers Company,
239 Diamond St., Pittsburgh, Pa.

Please enter my order for one.....motor car, with the following specifications:

Style or Type .....
List or Catalog Price.....
Finish of Body.....
Finish of Running Gear.....
Tires .....
Date Wanted .....
Place of Delivery .....
Remarks .....
.....
.....

For which I agree to pay list price f. o. b. factory as follows:
$.....upon the signing of this order; balance upon delivery of said car to me.

(Signed) .....
Street and No. .....
By .....
City ..... Street.....

Accepted:
BANKER BROTHERS COMPANY,
By —— ——.

136 And now, to-wit, December 31st, 1907, the case stated as heretofore filed is amended by adding to the averments in the first page of the case the following:

That in addition to the selling of the automobile known as the Pierce Great Arrow, the defendant company is also engaged in selling three other makes of automobiles, all of which are manufactured outside of the State of Pennsylvania, under contracts similar in their terms to the contract Exhibit "A," attached to the case stated, and at times buys and sells in the State of Pennsylvania second-hand automobiles of different makes, and sells automobile repairs and supplies, as provided in said contract; that liability as to this business is not an issue in this case.

COMMONWEALTH OF PENNSYLVANIA,
By J. M. MAGEE,
GEORGE H. CALVERT,
Attorneys.
BANKER BROTHERS COMPANY,
By E. J. KENT,
H. A. MILLER,
Attorneys.

137 *Order Allowing Writ of Error.*

And now, to-wit, this 2d day of June, 1909, comes Banker Brothers Company, Plaintiff in Error above named, by its Attorneys, Edward J. Kent and Harvey A. Miller, and file herein and present their petition praying for allowance of Writ of Error intended to be urged by it, and praying also that a transcript of the record and proceedings upon which judgment herein was rendered, duly authenticated, may be sent by the Superior Court of the State of Pennsylvania to the Supreme Court of the United States; and that such other and further proceedings may be had as may be proper in the premises on consideration whereof, the Court does allow the Writ of Error, upon the plaintiff's aforesaid giving bond according to law in the sum of One Thousand ($1,000.00) Dollars, which shall operate as a Supersedeas bond.

OLIVER WENDELL HOLMES,
Associate Justice, Supreme Court of the United States.

138 [Endorsed:] In the Supreme Court of the United States. No. —. October Term 1909. Banker Brothers Company, a corporation of the State of Pennsylvania, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Petition to the Supreme Court of the United States for writ of error. Order of court allowing writ of error. Filed Jun- 7, 1909. Superior Court, Fifth District. Harvey A. Miller and E. J. Kent, Attorney- at Law, Pittsburg, Pa. 523-525 Farmers Bank Building.

139 In the Supreme Court of the United States, October Term, 1909.

No. —.

BANKER BROTHERS COMPANY, a Corporation of the State of Pennsylvania, Plaintiff in Error,

v.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Bond.

Know all men by these presents: That we Banker Brothers Company, a corporation, of the State of Pennsylvania, having its principal office in the city of Pittsburgh and state aforesaid as principal and Chas. M. Miller and W. W. Bennett as sureties, of the city of Pittsburgh, Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of One thousand ($1,000.00) dollars to be paid to the said Commonwealth, its certain attorneys or assigns to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 28 day of May 1909.

Whereas the above named principal, Plaintiff in error,
140 seeks to prosecute this Writ of Error to the Supreme Court of the United States, to reverse the judgment entered in the above entitled action by the Superior Court of Pennsylvania.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute this Writ of Error to effect and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

BANKER BROS. CO.,
By CHAS. M. MILLER,
President, Principal.
CHAS. M. MILLER,
W. W. BENNETT,
Sureties

Signed, sealed and delivered in the presence of
ALICE A. TRILL.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Chas. M. Miller and W. W. Bennett, sureties being each duly sworn on oath depose and say: we are each of lawful age and are citizens of the State of Pennsylvania, and know the contents of the foregoing instrument to which we have attached our names.
141 We each for ourselves say we are worth the sum of Three thousand ($3,000.00) dollars over and above all debts, liabilities and exemptions.

CHAS. M. MILLER.
W. W. BENNETT.

Sworn to and subscribed before me this 28th day of May 1909.

ALICE A. TRILL,
[SEAL.] *Notary Public.*

My Commission expires January 16, 1913.

And now, to wit, June 2nd, 1909, bond approved.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

142 In the Supreme Court of the United States. No. —. October Term, 1909. Banker Brothers Company, a Corporation of the State of Pennsylvania, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Filed June 7, 1909. Superior Court. Bond. Harvey A. Miller and E. J. Kent, Attorneys at Law, Pittsburgh, Pa.

143 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Banker Brothers Company, appellant, and The Commonwealth of Pennsylvania, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
144 of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

145 In the Supreme Court of the United States, October Term, 1909.

No. —.

BANKER BROTHERS COMPANY, a Corporation of the State of Pennsylvania, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Citation.

The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a Writ of Error filed in the Prothonotary's Office of the Superior Court of Pennsylvania at Pittsburgh, wherein Banker Brothers Company, a corporation, is Plaintiff in Error, and the Commonwealth of Pennsylvania is Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this 2d of June, in the year of our Lord One Thousand Nine Hundred and Nine.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

146 And now, to-wit, this 7th day of June, 1909, service accepted.

GEORGE H. CALVERT,
J. M. MAGEE,
Attorneys for the Commonwealth of Pennsylvania.

147 [Endorsed:] In the Supreme Court of the United States. No. —. October Term 1909. Banker Brothers Company, a corporation of the State of Pennsylvania, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Citation. Filed Jun- 7, 1909. Superior Court, Fifth District. Harvey A. Miller and E. J. Kent, Attoney- at Law, Pittsburg, Pa. 523-525 Farmers Bank Building.

148 *Certificate of Record.*

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Superior Court of Pennsylvania, sitting at Pittsburgh, do hereby certify that the foregoing record is a true and faithful copy of the record and proceedings of the Superior Court of Pennsylvania, sitting at Pittsburgh aforesaid, in a certain suit therein pending wherein the Commonwealth of Pennsylvania was plaintiff and the Banker Brothers Company was defendant at No. 181 April Term 1908 of the said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said The Superior Court of Pennsylvania, sitting at Pittsburgh, at Pittsburgh, this ninth day of June in the year of our Lord one thousand nine hundred and nine.

[Seal of the Superior Court of Pennsylvania, 1895.]

GEORGE PEARSON,
Prothonotary.

149 *Return to Writ.*

UNITED STATES OF AMERICA,
Superior Court of Pennsylvania, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the said Superior Court in the City of Pittsburgh this 11th day of June A. D. 1909.

[Seal of the Superior Court of Pennsylvania, 1895.]

GEORGE PEARSON,
Prothonotary of Superior Court, Sitting at Pittsburgh.

Costs of Suit.

Cost of transcript $110.50 paid by Banker Brothers Company, Appeallant.

GEORGE PEARSON,
Prothonotary.

Endorsed on cover: File No. 21,729. Pennsylvania Superior Court Term No. 72. Banker Brothers Company, plaintiff in error, vs. The Commonwealth of Pennsylvania. Filed June 17th, 1909. File No. 21,729.

13

SUPREME COURT U. S.
FILED
NOV 6 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

No. 72 October Term, 1911

Banker Brothers Company, Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania.

In Error to the Superior Court of the State of Pennsylvania.

Brief for Plaintiff in Error

EDWARD J. KENT,
HARVEY A. MILLER,
Attorneys for Plaintiff in Error.

Pittsburgh Printing Company, Pittsburgh, Pa.

IN THE

Supreme Court of the United States

No. 72 October Term, 1911.

Banker Brothers Company, Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania.

In Error to the Superior Court of the State of Pennsylvania.

Brief in Behalf of Plaintiff in Error.

1. *Abstract or statement of case.*

This was a case stated and passed upon by the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania, from which an appeal was taken to the Superior Court of said State which affirmed the lower Court; an appeal was then refused to the Supreme Court of said State, and a re-argument refused in the Superior Court after which a writ of error was allowed to this Honorable Court.

The principal question for consideration is whether from the agreed facts plaintiff in error is engaged in inter-state commerce, and, therefore, not liable to taxation by the State of Pennsylvania.

The facts as set forth in the case stated appear on page 52 of the printed record in connection with "Exhibit A" page 55 and "Exhibit B" page 58.

These facts, as agreed upon in the case stated, in substance, are briefly as follows:

Banker Brothers Company, plaintiff in error, is a corporation created under the laws of the State of Pennsylvania with its principal office in the City of Pittsburgh, Pennsylvania.

It is the exclusive agent and representative of the George N. Pierce Company of Buffalo, New York, in the Pittsburgh territory.

The George N. Pierce Company is a corporation created and existing under the laws of the State of New York with its principal office in Buffalo, New York, and is engaged in manufacturing the Pierce Great Arrow automobile in said city.

The plaintiff in error is engaged in soliciting orders for the Pierce Great Arrow automobile in and about the City of Pittsburgh by using a demonstrating car or automobile, and, in case of a sale the purchaser signs an order according to the form "Ex-

hibit B," a copy of which appears on page 58 of the printed record.

This signed order with the amount in cash paid when the order is signed, which is at least ten (10%) per cent. of the price of the automobile, is forwarded to the George N. Pierce Company, New York.

This order, so signed by the purchaser, when received by the George N. Pierce Company is accepted by it, and, the order is filled by shipment of the automobile in the name of the purchaser to the plaintiff in error who, by lifting the bill of lading attached, delivers the automobile to the purchaser, collects the balance of the purchase money and remits the same to the George N. Pierce Company of Buffalo, New York, less a commission of twenty (20%) per cent.

The George N. Pierce Company of Buffalo, New York, guarantees the automobile direct to the purchaser in Pennsylvania, and, no automobiles, whatever, are kept on hands or in stock by the Banker Brothers Company, plaintiff in error, in the City of Pittsburgh, Pennsylvania.

The George N. Pierce Company of Buffalo, New York, has entire control over the price as well as the territory in which orders may be taken, and, refuses to permit sub-agents except by its knowledge and consent.

Either the George N. Pierce Company of Buffalo, New York, or Banker Brothers Company of Pittsburgh, Pennsylvania, may terminate their contract by notice with or without cause.

The words "agent" and "dealer" both appear in the contract "Exhibit A" (for copy of contract see page 55 printed record): by the case stated, however, it is agreed that no significance is to be attached to either of these words by reason of their appearing in the contract.

This contract "Exhibit A" is between the George N. Pierce Company of Buffalo, New York, and Banker Brothers Company of Pittsburgh, Pennsylvania, and requires Banker Brothers Company to use the form of order blank "Exhibit B" (a copy of which appears in the printed record page 58) in obtaining orders for sales of automobiles.

This order when signed by the purchaser directs Banker Brothers Company, plaintiff in error, to enter the purchaser's order for an automobile with the factory, the George N. Pierce Company of Buffalo, New York, and provides for the delivery of the automobile to the purchaser F. O. B. Cars at Buffalo as soon as prior orders entered will permit.

The agreement (Exhibit A page 55 printed record) provides that this order shall only be binding

when accepted by the George N. Pierce Company of Buffalo, New York.

This covers briefly the facts as to the manner in which the business of the plaintiff in error is transacted, but, notwithstanding these facts, as to the manner in which this business is transacted, the contract "Exhibit A" (page 55 printed record), between the George N. Pierce Company (first party) and plaintiff in error (second party) reads as follows: "The first party agrees, to build for and to sell to second party until October 1st, 1906 (unless this instrument is sooner determined as agreed) Pierce automobiles at the following prices;"

In view of all these facts it was contended that plaintiff in error was engaged in inter-state commerce and, by reason thereof, was not liable to taxation under the provisions of the statute of the State of Pennsylvania; the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania, decided against this contention and the Superior Court of said State affirmed this decision, as a result of which this writ of error was obtained.

In addition to the question as to whether or not plaintiff in error was engaged in inter-state commerce it was contended that the Court of Common Pleas of Allegheny County based its opinion, as well as did the Superior Court, on facts not in the record,

or agreed upon, and, therefore we have the two questions involved, raised by the specifications of error.

FIRST. Is the plaintiff in error engaged in inter-state commerce, and, therefore, not liable to taxation by the State of Pennsylvania?

SECOND. Did the Court err in going outside of the facts agreed upon in the case stated?

Specifications of Error.

FIRST. The Superior Court erred in not reversing the Court of Common Pleas No. 4 of Allegheny County for the following reasons:

1. The Court erred in not treating Banker Brothers Company as the agent of the George N. Pierce Company of Buffalo, New York, as this fact was agreed upon in the case stated.

2. The Court erred in not holding the transaction under Exhibits A and B and as agreed to in the case stated, involves inter-state commerce, and, therefore, appellant cannot be held liable for state tax under the Act of May 2, 1899.

3. The Court erred in its effort to state the facts as the facts were agreed upon, and conclusions of law only remained to be found by the Court.

4. The Court erred in making the following order:

And now, to wit, January 21st, 1909, the Court being of the opinion that under the facts set forth in the case stated, the defendant is a retail vender of, or retail dealer in goods, wares and merchandise, within the meaning of the Act of the General Assembly of the State of Pennsylvania, entitled, 'An Act to provide revenue by imposing a mercantile license tax on venders of, or dealers in goods, wares and merchandise, and providing for the collection of said tax,' approved May 2d, A. D., 1899, it is ordered that judgment be entered in favor of the Commonwealth and against Banker Brothers, defendant, for the sum of $354.00, with costs.

BY THE COURT.

Being the order on which the judgment for $354.00 and costs was entered.

SECOND. The Superior Court erred in its apprehension of counsel's contention in holding "The counsel for appellant contend in their brief, as they did in the oral argument, that the Court below fell into error in considering all the facts which has been embodied in the case stated," and in holding as follows: "In attempting to escape from the legal results of the other facts and the contracts which had been embodied in the case stated, and to confine the inquiry to a fragment of the agreement, the learned counsel seem to lose sight of the facts that, while the fragment upon which they rely does state that "the defendant is the exclusive agent and representa-

tive of the George N. Pierce Company for the Pittsburgh territory," it does not state that the sales in question were made as the agent of the Pierce Company, nor does an implication that the sales were so made necessarily arise from the facts stated in that part of the agreement upon which they seem to rely."

THIRD. The Superior Court erred in holding "The Pierce Company, a manufacturing corporation of the State of New York, under the provisions of this agreement contracted to sell automobiles to the defendant, a Pennsylvania Corporation, at prices for each type of automobiles twenty per cent. below the 'list price' for the respective types, deliveries to be F. O. B. Buffalo, as soon after orders for delivery were from time to time received as practicable and as the prior orders of other parties and the Pierce Company's business would permit; payment to be made in cash."

FOURTH. The Superior Court erred in holding "The contract does not contain one word which authorizes the defendant company to enter into any contract on behalf of or bind the Pierce Co. by any engagement with any third party. This was a contract for the sale of automobiles and did not create between the parties the relation of principal and agent. The Pierce Co., a manufacturer, secured by this contract a responsible purchaser for the product of its factory, and made it to the interest of

that purchaser to further the sale of such product, within the designated territory, by a liberal discount from the list price, thus enabling the purchaser to sell at a profit. The contract secured to the purchaser, this defendant, a clear field for the sale of the goods that he bought through the operation of the covenant that the manufacturer would not sell to others within the same territory. When this defendant, a Pennsylvania corporation, paid the sight draft with bill of lading attached and took possession of an automobile when it arrived, that car, then in Pennsylvania became the absolute exclusive property of this Pennsylvania corporation. The Banker Brothers Company could then have sold such cars to any person at any place, and for any price that to them was satisfactory, and the purchaser would have taken a good title."

FIFTH. The Superior Court erred in holding "When a customer determines to buy a machine he signs an order upon the form exhibit "B" attached to and made part of the case stated. This order is addressed to Banker Brothers, the defendant corporation, and in it the purchaser agrees to buy an automobile of a type, style and finish designated in the order, at the list price, F. O. B. factory; and to pay in cash an amount then agreed upon and the balance upon delivery of the car to him. The order is then accepted by Banker Brothers and constitutes the contract between the defendant corpor-

ation and those to whom they make sales. The defendant company in this contract of sale covenants in its own right. The contract contains no suggestion that the defendant corporation is acting as the agent for the Pierce Company or any other person or corporation, nor does it contain anything from which an inference could be drawn that it was in the matter acting as an agent or representative. The purchaser becomes bound to Banker Brothers only and acquires no rights, under this contract, against any other person or corporation. In case the automobile is not delivered to the customer according to the terms of the contract his only remedy would be against Banker Brothers Company, the defendant corporation. In case a purchaser declined to accept an automobile when it was tendered according to the term of the contract, the only person who, under this contract, would have a remedy against such purchaser would be this defendant. These sales are sales by the defendant corporation, in its own right, and not as the agent of the Pierce Company."

SIXTH. The Superior Court erred in holding "The facts set forth in the case stated clearly establish that the defendant corporation was a dealer, which bought automobiles from a factory located in New York."

SEVENTH. The Superior Court erred in holding "The defendant company is, so far as this particular

business is concerned, one who buys to sell again, and is, within the meaning of the act of 1899 a retail vender of merchandise and subject to the tax imposed by that act on such business. The sale made by the Pierce Company to the defendant corporation in view of the manner in which the contract is executed, involves interstate commerce, and down until the automobile comes into the possession of the defendant company in Pennsylvania, the transaction is within the protection of the Constitution of the United States. The sales which the Pennsylvania corporation makes to citizens of Pennsylvania and which are completed by a delivery to the purchaser in Pennsylvania, of cars which had become the property of the Pennsylvania corporation, are subject to the taxing power of the state.

EIGHTH. The Superior Court erred in affirming and in not reversing the Court of Common Pleas No. 4 of Allegheny County and in not holding the transaction covered by the facts in the case stated is one involving interstate commerce and is protected by the State of Pennsylvania from taxation by Article I, Sec. 8, Clause 3 of the Constitution of the United States which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and the Indian tribes."

NINTH. The Superior Court erred in affirming and in not reversing the judgment of the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania.

Argument.

The Act of Assembly of the State of Pennsylvania, passed May 2, 1899, P. L. 184, Sections 1 and 2, under which the Commonwealth of Pennsylvania claims the right to tax plaintiff in error, reads as follows:

"AN ACT

To provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares and merchandise, and providing for the collection of said tax.

Section 1. Be it enacted, etc. That from and after the passage of this act, each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume gross, of business transacted annually. Each dealer in or vender of goods, wares or merchandise at any exchange or board

of trade shall pay a mercantile tax of twenty-five cents on each thousand dollars worth, gross, of goods so sold.

Section 2. And it is provided that all persons who shall sell to dealers in or venders of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this act to be wholesalers; and all other venders of or dealers in goods, wares and merchandise shall be retailers, and shall pay an annual license tax as provided in this act for retailers."

As against this claim, to tax plaintiff in error under this Act of Assembly of the State of Pennsylvania, it was contended on the part of plaintiff in error that the facts, agreed to in the case stated, clearly show plaintiff in error is engaged in inter-state commerce and is relieved from such taxation by Section 8, Article 1 of the Constitution of the United States as follows:

"Congress shall have power to regulate com-
"merce with foreign nations and among the sev-
"eral states and with Indian tribes."

This leads, therefore, to the consideration of the first question involved in this case.

Is the plaintiff in error engaged in inter-state commerce, and, therefore, not liable to taxation by the State of Pennsylvania?

We contend the plaintiff in error is clearly engaged in inter-state commerce and is, therefore, not liable to taxation, and in support of this position submit the following authorities:

Dozier vs. the State of Alabama, 218 U. S. 124.

Rearick vs. Pennsylvania, 203, U. S. 507.

Colwell vs. North Carolina, 187, U. S. 622.

Robbins vs. Shelby County, 120, U. S. 489.

Wilton vs. Missouri, 91, U. S. 275.

Brennon vs. Titusville 153, U. S. 289.

Lyng vs. the State of Michigan 135, U. S. 166.

The most recent case directly in point is that of *Dozier vs. the State of Alabama supra,* which holds as follows:

> "The protection of the commerce clause of the Federal constitution extends beyond the strict lines of contract, and inseparable incidents of a transaction of inter-state commerce based on contract are also inter-state commerce."
>
> "Where under the contract to purchase a picture, the purchaser has the option to take at a specified price the frame in which the picture shall be delivered, and both picture and frame are manufactured in and delivered from another State and remain the property of the vender until paid for, the sale of the frame is a part of the

original transaction and protected by the commerce clause of the constitution."

Now the manner in which the plaintiff in error transacts business is more decidedly between citizens of different States than this case, for the reason that the automobile sold is always actually ordered and the order signed by the purchaser submitted to the factory at Buffalo, New York, *where it must first be accepted,* after which the automobile is shipped to fill the order of the particular individual named therein; in each instance (as appear by the facts agreed upon, printed record page 53 (f) the automobile is manufactured according to the particular type ordered to suit the taste of the particular purchaser; now we submit, the facts in the case under consideration as to the delivery of the automobile, collection of the money therefor, the payment to the George N. Pierce Company of Buffalo, New York, by the plaintiff in error and all of the details of the transaction as they appear in this case are so similar to that of the case of *Dozier vs. the State of Alabama* that we need not here repeat the facts to compare them further.

As against these agreed facts, in this case, to the effect that the automobiles are clearly sold by means of obtaining orders by exhibiting what is known as a demonstrating car, or automobile to the prospective purchasers, is apparently the only ground relied

upon by the defendant in error, viz., that the contract "Exhibit A" page 55 of the printed record has the following wording "the first party agrees first, to build for and to sell to second party until October 1, 1906 (unless this instrument is sooner terminated as agreed) Pierce automobiles at the following prices:" we submit that both the lower Court and the Superior Court of Pennsylvania over-looked and disregarded all the remaining provisions of this contract, as to the manner in which the business is transacted, which is by the use of the order to be signed by the purchaser to be submitted to the factory and accepted by it, the automobile to be manufactured for the particular purchaser and according to the style and type as ordered, and the automobile then shipped in the name of the purchaser to the plaintiff in error, as the agent of the George N. Pierce Company of Buffalo, New York, to be delivered to the purchaser.

That the question of inter-state commerce is viewed in a broader sense than even a "technical binding contract" we refer to the opinion of Mr. Justice Holmes as appears in the case of *Dozier vs. the State of Alabama, supra,* page 128 as follows:

> "But as was hinted at in *Rearick vs. Pennsylvania* 203 U. S. 507, 512, what is commerce among states is a question depending upon broader consideration than the existence of a

technically binding contract or the time and place where the title passes."

The case of *Rearick vs. Pennsylvania* 203 U. S. 507 holds as follows:

> "Where orders are given for goods sold by an agent of a person employed to solicit them in another state and the purchaser is not bound to pay for the goods until delivery and unless according to sample, the goods sent specifically to the customer in fulfillment of each order or, until actually delivered, are within the protection of the commerce clause of the Constitution, and a municipal ordiance requiring a license fee for the solicitation of orders for the delivering goods not of the parties' own manufacture is void as an interference with inter-state commerce against such an agent."

The Court in its opinion page 512 in this case further says as follows:

> "The brooms were specifically appropriated to specific contracts, in a practical, if not a technical sense. Under such circumstances it is plain that, where ever might have been the title, the transport of the brooms for the purposes of filling the contracts was protected."

It is, therefore, unnecessary, we contend, to inquire into the question whatever as to the time and place of the passing of title, although, we submit, in this case under consideration, the title undoubtedly

passes from the manufacturer to the purchaser and as stated in the facts agreed upon (see printed record page 52 (paragraph No. 1), the plaintiff in error is the "exclusive agent and representative" of the George N. Pierce Company of Buffalo, New York, and acts for all purposes in that capacity.

One of the reasons relied upon by defendant in error in the Superior Court was that since the automobile was shipped in the name of the purchaser to the plaintiff in error for delivery thus passing into possession of plaintiff in error, plaintiff in error therefore instanter became liable for taxation: this, we submit, is clearly not the law and as authority, that it is not, we submit the case of *Colwell vs. North Carolina* 187 U. S. 622 which holds as follows:

> "Where a portrait Company, carrying on business in one State obtains orders through an agent in another State for pictures and frames and sends them in separate packages, for convenience in packing and handling, to its agent, who places the pictures in their proper places or frames and delivers them to the persons ordering them, does not deprive the transaction of its character of inter-state commerce or take it out of the salutary protection of the commerce clause of the Federal Constitution."

Now as a general proposition as to just at what time or what point property from another State becomes liable to taxation, we submit the question

seems to be settled that such property only becomes liable to taxation when it has reached its destination and becomes mingled with the other property of the State and enjoys the protection of its laws.

As authority upon this point we respectfully cite the case of *American Steel & Wire Company vs. Speed* 192, U. S. 500 which holds as follows:

> "Goods bought in original packages from another State after they have arrived at their destination and at rest within the State, and are enjoying the protection which the laws of the State afford, may, without violating the commerce clause of the constitution, be taxed without discrimination like other property within the State, although at the time they are stored at a distributing point from which they are subsequently to be delivered in the same packages through the storage company to the purchasers in various States."

The Court in discussing this case seems to emphasize the point that the goods must reach their "destination" must be "at rest mingled with the other goods of the State" before liable to taxation.

We also submit the further authority of *General Oil Company vs. Crain* 209 U. S. 211, which holds as follows:

> "Merchandise may cease to be interstate commerce at an intermediate point between the place of shipment and ultimate destination; and

if kept at such point for the use and benefit of the owners and under the protection of the laws of the State it becomes subject to the taxing and police power of the State."

This case of *General Oil Company vs. Crain* was a case in which oil had not reached its ultimate destination but was kept in storage for the benefit of the owners and under the protection of the laws of the State in which it was stored and by a divided Court was held to be liable to taxation by the State in which it was stored; Mr. Justice Moody writing a dissenting opinion concurred in by Mr. Justice Holmes.

Applying, therefore, this rule to the facts in the case under consideration we contend that if the transaction is one involving inter-state commerce the plaintiff in error is not liable to taxation for the reason that the automobiles shipped from Buffalo, New York, at no time reach their destination until delivered to the purchaser, nor are they, at any time, at rest mingled with the property of this State.

Second Question Involved.

Did the Court err in going outside of the facts agreed upon in this case, or in other words disregard the facts agreed upon?

A consideration of this question necessitates setting out a brief summary of the facts as agreed upon

in the case stated; the case stated comprises a written stipulation of facts by which the Court was bound (see page 52, printed record), a contract "Exhibit A" (see page 55, printed record), and an order form "Exhibit B" (see page 58, printed record.)

The whole theory of plaintiff in error in this case is that Banker Brothers Company of Pittsburgh, Pennsylvania, used an automobile manufacturned by the George N. Pierce Company of Buffalo, New York, to make the demonstrations from time to time to prospective purchasers of automobiles and obtain orders for sales and forward these orders to the George N. Pierce Company's factory at Buffalo, New York, to be accepted and in doing so acts only in capacity of agent or representative of the Buffalo Company; that this is clearly an inter-state transaction between citizens of different states and is protected by the commerce clause of the Federal constitution.

Clause No. 1 (page 52, printed record) of the agreed facts stipulates plaintiff in error "is the exclusive agent or representative of the George N. Pierce Company for the Pittsburgh territory."

Beginning on page 52 of printed record paragraphs lettered (a) to (i) inclusive gives the details of how the business of plaintiff in error is conducted, and, we submit by examination of these agreed facts

it is beyond question or contradiction by the Court that plaintiff in error uses an automobile as a demonstrator and, by means thereof, solicits and obtains orders at the price fixed by the factory and sends these orders to the factory to be accepted and filled; and the automobiles so ordered are manufactured after the order is received and accepted by the George N. Pierce Company of Buffalo, New York, to suit the particular type as ordered by the purchaser; the automobile is shipped to the plaintiff in error for delivery; plaintiff in error is notified by the factory that the automobile ordered for such purchaser is shipped, with sight draft and bill of lading attached, and plaintiff in error then receives and delivers the automobile to the individual so designated and remits to the George N. Pierce Company of Buffalo, New York, the balance of the purchase price less twenty (20%) per cent. commission. This now is, in substance, the real transaction which, it has been agreed upon in the case stated, takes place; this is altogether consistent with the main provisions of the contract "Exhibit A" page 55, printed record, between plaintiff in error and the George N. Pierce Company; that contract requires the use of the particular order blank "Exhibit B" (see page 58, printed record); the contract provides the order is not binding unless accepted by it, the George N. Pierce Company, or in other words the order signed by the purchaser in Pennsylvania is not binding unless ac-

cepted by the George N. Pierce Company of Buffalo, New York. Now notwithstanding these agreed facts the Superior Court of Pennsylvania sustained the lower Court in holding and held that a sale took place between the George N. Pierce Company and Banker Brothers Company, plaintiff in error, and the delivery of the automobile to the purchaser who signed the order which was delivered to the George N. Pierce Company of Buffalo, New York, constitutes a resale mainly because the contract, between the plaintiff in error and the George N. Pierce Company, contained the following clause:

> "The first party agrees,
>
> "First. To build for and to sell to second party until October 1st, 1906, (unless this instrument is sooner terminated as agreed), Pierce automobiles at the following prices:"

In doing this it is contended the Court completely ignored the real facts as agreed upon and the spirit in which the business was transacted and read into its opinion facts not agreed upon or appearing in the case as stated.

The Superior Court of Pennsylvania in passing upon this case in affirming the decision of the Court in Common Pleas No. 4 of Allegheny County, Pennsylvania, says

> " . . . . . , while the fragment upon which they rely does state that "the defendant is the

exclusive agent and representative of the George N. Pierce Company for the Pittsburgh territory," it does not state that the sales in question were made as the agent of the Pierce Company, nor does an implication that the sales were so made necessarily arise from the facts stated in that part of the agreement upon which they seem to rely."

This certainly is not according to the agreed facts; no "implication that the sales were made" by plaintiff in error acting as the agent of the Pierce Company need arise; for the facts to reach this conclusion are *expressed in the case stated* and not even an implication to the contrary in the agreement "Exhibit A" referred to by the Court, should stand or prevail against the agreed facts as to the manner in which the transaction takes place; or in other words, the agreed facts in regard to the transaction should prevail as against any technical question raised against a particular clause of the contract read so as to be inconsistent with the remainder of the contract; for the contract, itself, requires the use of the form exhibit "B" in obtaining the orders for sales of automobiles and the acceptance by the George N. Pierce Company of New York as appears on page 55 of the printed record.

The Superior Court states (see 4th assignment of error foot of printed page 43).

"The contract does not contain one word which authorizes the defendant Company to enter into any contract on behalf of or bind the Pierce Co. by any engagement with any third party."

This, we submit, is clearly error for the contract referred to "Exhibit A" (see portion printed record page 56) expressly says:

"Such orders to be binding only when entered on order form furnished herewith and duly signed by second party, and accepted by first party (meaning the George N. Pierce Company) same to become a part of this contract."

This provision requiring the George N. Pierce Company to accept the order signed by the purchaser, we submit, clearly creates a contract directly between the purchaser who signs the order and the George N. Pierce Company of Buffalo, New York.

The Superior Court of Pennsylvania (see portion of 4th assignment of error printed record page 44) further says:

"When this defendant a Pennsylvania corporation, paid the sight draft with bill of lading attached and took possession of an automobile when it arrived, that car, then in Pennsylvania, became the absolute exclusive property of this Pennsylvania corporation. The Banker Brothers Company could then have sold such cars to any person at any place and for any price that

to them was satisfactory, and the purchaser would have taken a good title."

This, we submit, again is clearly an error on the part of the Court, for if this conclusion were correct and the automobile then became the absolute and exclusive property of Banker Brothers Company we would entirely ignore the agreed facts that this particular automobile was made for the particular person who signed the order, and paid part of the purchase money and for whom this particular type, style and quality of automobile was manufactured; and we further contend that Banker Brothers, plaintiff in error, cannot pass title to any person at any place and for any price that was satisfactory to it in direct violation of the order signed by the person submitted to the factory for whom this particular automobile was manufactured and delivered for the purchaser f. o. b. cars at Buffalo.

The Superior Court in its opinion (see page 44 printed record part of 5th assignment of error) says as follows:

"The order is then accepted by Banker Brothers Company and constitutes the contract between the defendant corporation (meaning Banker Brothers Company) and those to whom they make sales. The defendant company in this contract of sale covenants in its own right. The contract contains no suggestion that the defendant corporation is acting as the agent for the

Pierce Company or any other person or corporation, nor does it contain anything from which an inference could be drawn that it was in the matter acting as an agent or representative.

The Superior Court here entirely loses sight of the agreed facts that this order must be entered at the factory with the George N. Pierce Company and accepted by it before it becomes a binding contract.

> "Such orders to be binding only when entered on order form furnished herewith and duly signed by second party and accepted by first party (meaning the George N. Pierce Company) same to become a part of this contract."

From these facts it is therefore contended that when Banker Brothers Company, plaintiff in error, secured the signature of a purchaser for an automobile to the order form "Exhibit B" as appears on page 58 of printed record, this signature of the purchaser to this order form only directs Banker Brothers Company, plaintiff in error, to do as the order says, to enter the order for the type and style of an automobile as described therein with the factory at Buffalo, New York, and, Banker Brothers Company in no way became bound to deliver the automobile but only to forward the order with the cash payment to the Company at Buffalo where it is entered and accepted by reason of which it, then, becomes a binding contract, not between Banker Brothers Company and the purchaser, but, between the George N. Pierce Company of Buffalo, New York, and the purchaser.

For the foregoing reasons, therefore, we contend the Superior Court erred by the conclusion reached in the 6th, 7th, 8th and 9th assignments of error as set out on page 44 printed record, to the effect that a sale took place between the George N. Pierce Company and plaintiff in error and that a re-sale by plaintiff in error was made to the person who signed the order and by holding plaintiff in error was a dealer in goods, wares and merchandise and in sustaining the decision of the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania, when as a matter of law, we submit, it should have been reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 72 OCTOBER TERM, 1911.

BANKER BROTHERS COMPANY, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In Error to the Superior Court of the State of Pennsylvania.

Brief for Defendant in Error.

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vs.

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In Error to the Superior Court of the State of Pennsylvania.

Counter Statement of the Case.

Banker Brothers Company, the plaintiff in error, is a Pennsylvania corporation, with its principal office at Pittsburgh, and is engaged in the business of selling, throughout the surrounding territory, four makes of automobiles, all manufactured without the State, together with the parts and accessories thereof; and at times buys and sells, in the State of Pennsylvania, second-hand automobiles of different makes.

One of the makes of automobiles so sold by the plaintiff in error is that known as the "PIERCE GREAT ARROW," which it sells under contract with the manufacturer, the George N. Pierce Company, of Buffalo, New York, a copy of which is attached to the case stated and marked Exhibit "A." (Record, page 55).

No Pierce Great Arrow automobiles are kept in stock, but when the plaintiff in error secures a purchaser for one of these machines, it presents for his signature an order blank, a copy of which is attached to the case stated and marked Exhibit "B." (Record, page 58). The name of the George N. Pierce Company does not appear on this blank, the order being accepted by the plaintiff in error not as agent but in its own behalf.

The plaintiff in error then forwards to the George N. Pierce Company, at Buffalo, an order signed by it for the manufacture of the automobille, which, in due course, is shipped by the Pierce Company to the plaintiff in error at Pittsburgh, with sight draft attached to bill of lading. The plaintiff in error thereupon pays the draft and receives the car, and thereafter completes its contract with the purchaser, delivering the automobile and receiving the purchase price.

In the consummation of this second sale the Commonwealth of Pennsylvania contended that the plaintiff in error acts as a retail dealer in or vender of goods, wares and merchandise, within the meaning of the Pennsylvania Act of May 2nd, 1899, P. L. 184, and is, therefore, liable to the tax imposed by that Act. On the other hand, for the plaintiff in error it was contended that it was the agent or representative of the George N. Pierce Company, a corporation of the State of New York, and for that reason, as well as for the reason that its business was interstate commerce, it was not subject to taxation under the laws of the State of Pennsylvania. The case originally involved also the question whether or not the plaintiff in error was a merchandise broker within the meaning of the Act of April 14, 1905, of the State of Pennsylvania, but this question is not now in issue.

To determine the controversy, a case stated was submitted to the Court of Common Pleas No. 4 of Allegheny County, Pennsylvania, which upheld the contention of the Commonwealth. On appeal, this ruling was affirmed by the Superior Court of Pennsylvania, and from its judgment a writ of error was allowed by this Court, the Supreme Court of Pennsylvania having in the meantime refused an appeal.

Argument.

The court of last resort in Pennsylvania has decided that the plaintiff in error is a vender of or dealer in goods, wares and merchandise within the meaning of the Act of the State of Pennsylvania of May 2, 1899, P. L. 184, and is, therefore, subject to the tax imposed by that Act. The plaintiff in error contends, however, that its business is that of interstate commerce and that, therefore, even though it were a dealer or vender within the meaning of the Act it was beyond the power of the legislature of the State of Pennsylvania to subject it to the tax. It is this phase of the controversy which gives this court jurisdiction to inquire into the matter. As to whether or not the plaintiff in error is a vender or dealer within the meaning of the Act, we submit that the decision of the court of Pennsylvania is conclusive, and that the only question now for consideration is whether, even though the appellant be such a vender or dealer, if its business be in point of fact commerce between the state, it is without the terms of the Act imposing such a tax on such persons doing business in the State of Pennsylvania.

The relation existing between the plaintiff in error and the manufacturers of the automobiles it sells must be determined from the contract Exhibit "A," which is attached to the agreed statement of facts. This contract with the George N. Pierce Company is agreed to be fairly representative of all the contracts. In the first paragraph thereof (Record page 55) it is provided that

> "The first party agrees (1st) to build for and to sell to second party—Pierce automobiles at the following prices—Subject to such extra charges—as may be determined when orders are accepted. Such orders to be binding only when entered on order form furnished herewith and duly signed by second party and accepted by first party, same to become a part of this contract."

First party further agrees that it will not sell to any other person in the prescribed district. The second party, among other things, agrees to promptly pay for all Pierce automobiles and accessories, either by cash payment in advance, or by accepting and paying drafts with bills of lading attached, at sight, on presentation.

Under this agreement, therefore, and those with the other manufacturers, which are agreed to be similar, what is the relation existing between the manufacturers and the plaintiff in error?

It is difficult to see how there could be any other answer to this inquiry than that the relations between them are that of manufacturer and purchaser. The manufacturer recognizes only the plaintiff in error and plaintiff in error agrees to pay for the automobiles. It is submitted, therefore, that the plaintiff in error is the purchaser of the automobile from the manufacturers. What then becomes of the automobile? Exhibit

"B" attached to the statement of facts is the order form used by the plaintiff in error. In no way does it refer to the manufacturer but is simply an order given by the customer to Banker Brothers Company, the plaintiff in error, and accepted by that Company. Upon the receipt and acceptance of this order, Banker Brothers Company then, in order to enable it to carry out its contract with its customer, orders the automobile, which it ultimately expects to deliver to that customer, from the manufacturer, so that two separate contracts are required to consummate the transaction as shown clearly by Exhibit "A" and Exhibit "B."

Exhibit "A" provides that the orders which the Pierce Company is to receive are to be on the order form furnished by it, signed by the second party, which is the Banker Brothers Company, and accepted by the first party, which is the Pierce Company. A copy of this form of order is not attached to the agreed statement of facts. On the other hand, a copy of Exhibit "B" is attached and by its terms it is clearly shown that the only parties mentioned in it are the Banker Brothers Company and the ultimate purchaser of the automobile. The manufacturer under the contract Exhibit "A" agrees to deliver to Banker Brothers Company, and Banker Brothers Company agrees to accept and pay for the automobile. Shipment of the car is made to Banker Brothers Company, as has been agreed in the statement of facts, and the bill of lading with sight draft attached is also sent to that company. Possession of the car can, therefore, not be secured by Banker Brothers Company until it pays the sight draft. That being done, the automobile is in the possession of Banker Brothers Company, is its absolute property, and is an article of merchandise within the State of Pennsylvania.

All interest of the manufacturer in the transaction is then at an end. The Banker Brothers Company then has possession of the car. The similarity of stock cars makes it practically impossible for a customer of Banker Brothers to identify any particular car as the one he has ordered. Upon delivery of the car Banker Brothers Company receives whatever may be owing on the car price, and that amount is owing to the Bankers Brothers Company and no part of it can belong to the manufacturer, for Banker Brothers Company has paid the manufacturer in full before it secured possession of the car. The amounts owing in the two transactions may, and usually do, differ. We have then two separate and distinct sales of the car in question, and the sale which the State of Pennsylvania has undertaken to tax is the sale which is made in Pennsylvania by Banker Brothers Company, a resident of the State of Pennsylvania, to its customer, also a resident. The customer of Banker Brothers Company has had absolutely no dealings with the manufacturer, has had no contract with the manufacturer, and certainly it could not be maintained that the customer can hold the manufacturer for a breach of the contract to deliver the automobile.

The fact that upon receipt of an order from its customer, Banker Brothers Company orders the automobile from the manufacturer outside the state, in no way affects the question.

> "In carrying on the domestic business petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon arrival there they

became a part of the taxable property of the state. It made no difference whence they came and to whom they were ultimately sold."

Kehrer vs. Stewart, 197 U. S., 65.

That sale by the manufacturer is not attempted to be taxed. While it is undoubtedly true that the purchaser knows that the automobile must be so manufactured, having ordered a car of a particular make, nevertheless his contract relations are exclusively with the Banker Brothers Company and he has no agreement of any nature with the manufacturer. Certainly the manufacturer might refuse to accept the order of Banker Brothers Company, or, having accepted the order, might refeuse to deliver the automobile, without subjecting itself to any right of action on the part of the purchaser, who looks only to Banker Brothers Company.

We have then a sale by Banker Brothers Company to its customer, which is a sale by a citizen of Pennsylvania to another citizen of Pennsylvania, made within the State of Pennsylvania, and it is this transaction which the State of Pennsylvania is undertaking to tax under the act of 1899.

As the matter then stands, under the decision of the court of last resort of Pennsylvania, the plaintiff in error is clearly within the provisions of the said Act, and leaving out any question of this Act violating the commerce clause of the Constitution, the plaintiff in error is clearly liable to the tax imposed thereby.

But the plaintiff in error says that its business is that of interstate commerce, and that the said Act of Pennsylvania of May 2nd, 1899, P. L. 184, in so far as it might in anywise attempt to impose a tax upon that business, is an attempt to regulate interstate com-

merce, and therefore a violation of Article I, Section 8, of the Constitution of the United States, which provides: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

While the transaction between the manufacturer and the plaintiff in error is undoubtedly interstate commerce, we contend that the transaction between the plaintiff in error and its customer is not interstate commerce. This was the conclusion reached by the Court of Common Pleas of Allegheny County, and if it be correct, then there, of course, can be no question of the Act in question attempting to regulate interstate commerce; but whether it be interstate commerce or not, we contend that the Act does not attempt to regulate such commerce, and is, therefore, not in violation of the quoted provision of the Federal Constitution.

MERCHANDISE, EVEN THOUGH AN ARTICLE OF INTER-STATE COMMERCE, IS SUBJECT TO STATE TAXATION, PROVIDED THE ACT IMPOSING SUCH TAX DOES NOT ATTEMPT TO REGULATE INTERSTATE COMMERCE OR DISCRIMINATE AGAINST IT.

So far as the second transaction is concerned, when the automobile was received by the plaintiff in error, it was not in transit but had reached its destination, to-wit, Pittsburgh, and was there held by the plaintiff in error as property enjoying the protection of the laws of the State of Pennsylvania. That such property is clearly subject to state taxation is determined by many decisions of this Court, beginning with *Brown vs. Maryland,* 12 Wheaton, 436. The leading authority is *American Steel & Wire Company vs. Speed,* 192 U. S.,

520, which reviews the preceding cases. This company was a New Jersey corporation engaged in the manufacture of nails and wire. None of its factories was situated in the State of Tennessee, but it shipped certain of its goods manufactured in other States to Memphis, Tennessee. The manner in which its product was sold is ascertained from the following abstract of the opinion of this Court (Page 513):

> "These contracts are made usually before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the southwestern country in the manner above stated, visiting the various jobbers, ascertaining the amount of goods they will require within 60 or 90 days, and the contract is prepared to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity, upon the goods being delivered to him after he shall have made, and according to, his specification. * * * "

The State of Tennessee levied a tax on these goods so held for sale in the City of Memphis, and the Wire Company attempted, by means of a bill in equity, to recover the amount of the tax paid by it under protest. The Supreme Court of Tennessee upheld the tax, and upon appeal to the Supreme Court of the United States, Mr. Chief Justice White, after stating the facts, says, page 518:

> "With these facts in hand we are of opinion

that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consummated. All question, therefore, as to the power of the state to levy the merchant's tax based on the contrary contention, being without merit, may be put out of view. The other propositions pressed upon our attention require consideration. They relate to two subjects: First, the asserted want of power of the state of Tennessee to tax because the goods were imported from another state, and were yet, it is contended, in the original packages."

p. 521:

"As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect inter-state commerce.

To the same effect is the case of

Emert vs. Missouri, 156 U. S., 320,

where this Court said:

"This exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state, as the property of other citizens is taxed, nor from regulating

matters of local concern which may incidentally affect commerce."

Following this we have:

"The controlling force of the two cases last reviewed upon this becomes doubly manifest when it is borne in mind that the power of the states to levy general and undiscriminating taxes on merchandise shipped from one state into another may attach to such merchandise before sale in the original package when the merchandise has become at rest within the state, and therefore enjoys the protection of its laws, and this upon the well recognized distinction that the movement of merchandise from state to state, whilst constituting interstate commerce, is not an import in the technical sense of the Constitution:"

American Express Co. vs. Iowa, 196 U. S., 146.

And again, this Court has said in *Darnell vs. Memphis*, 208 U. S., 119:

"As a prelude to a review of the cases referred to, we observe that while it is undoubted that it has been settled that where property which has moved in the channels of interstate commerce is at rest within a state and has become commingled with the mass of property therein, it may be taxed by such state without thereby imposing a direct burden upon interstate commerce, that doctrine, as expounded in the decided cases, including those relied upon by the court below, has always expressly excluded the conception that a state could, without directly burdening interstate commerce, discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property of a like nature.

"The leading cases announcing the doctrine that a state may tax property which had moved in the channels of interstate commerce, when such property had become at rest therein, even before sale in the original package, are *Woodruff vs. Parham* and *Brown vs. Houston, supra.* But in both those cases it was sedulously pointed out that the power which was thus recognized did not, and could not, include the authority to burden the property brought from another state with a discriminating tax. In *American Steel & Wire Company vs. Speed,* 192 U. S., 519, where the doctrine of *Woodruff vs. Parham* and *Brown vs. Houston* was reviewed and re-stated, it was pointed out that to prevent the levy of a tax upon property brought from another state, even after it had come at rest within a state, from being a direct burden upon interstate commerce, property so situated must be taxed 'without discrimination, like other property situated within the state.'"

And again, we have the case of *Phillips vs. Mobile* 208 U. S., 479, where this Court said:

"Even where the subject of transportation is not intoxicating liquor, this Court has held that goods brought in the original packages from another state, having arrived at their destination, and being at rest there, may be taxed, without discrimination, like other property within the state, even while in the original packages in which they were brought from another state. *American Steel & Wire Co. vs. Speed,* 192 U. S., 500."

UPON RECEIPT OF THE AUTOMOBILE BY BANKER BROTHERS COMPANY, IT HAD REACHED ITS DESTINATION AND WAS AT REST IN THE STATE WITHIN THE MEANING OF THIS RULE.

What space of time usually intervened between the receipt of an automobile by Banker Brothers Company and its subsequent delivery to its customer, is not stated in the agreed facts. It is fair to assume, that in some cases it might be a short interval of time, and that in other cases the car might be in the possession of that Company for a considerable period of time; but upon its arrival in Pittsburgh and its acceptance by that Company, the course of its transportation between states was at an end. The following would appear to be the rule as to when such an article of commerce is "at rest within the state:"

> "The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe vs. Errol*, 116 U. S., 517, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown vs. Houston*, 114 U. S., 622, the point of time at which it arrives at its destination."
>
> *General Oil Company vs. Crain*, 209 U. S., 228.

In *Brown vs. Houston*, 114 U. S., 622, coal shipped to the State of Louisiana, while still in the barges on the river, was held to be "at rest within the state" within the meaning of this rule. The same was true in the case of *Pittsburg Coal Co. vs. Bates*, 156 U. S., 578, and

the court further held that while the coal was still in the barges on the river it had become mingled with and was a part of the general mass of property within the state.

> "In further specialization of these propositions we may say that the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another state. In the one case, though it have not reached its place of disembarkation or delivery it may be taxed; 114 U. S., 622. In the other case, until it be shipped or started on its final journey it may be taxed; 116 U. S., 517."
>
> *Diamond Match Co. vs. Village,* 188 U. S., 96.
>
> "In order to fix the period when interstate commerce terminated, the criterion announced in *Brown vs. Maryland,*—that is sale in the original packages at the point of destination—was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce."

Justice White in *American Steel & Wire Co. vs. Speed*, 192 U. S. 521, speaking of the former decisions of the Court in *Woodruff vs. Parham*, and *Brown vs. Houston.*

THE ACT LEVYING THE TAX DOES NOT ATTEMPT TO REGULATE INTERSTATE COMMERCE AND DOES NOT DISCRIMINATE AGAINST IT.

The act in question is entitled,

> "An Act to provide revenue by imposing a mercantile license tax on venders of, or dealers in, goods, wares, and merchandise, and providing for the collection of said tax."

The tax as to parties selling at retail is $2.00 and one mill additional on each dollar of the whole volume gross of business transacted annually. It will be seen that the act applies to all venders or dealers, irrespective of the source from which their merchandise is obtained, and is, therefore, uniform and in no way refers to the source of the supply. Nor, as we understand the rule, can this make any difference.

> "When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another state, and that they be not taxed by reason of being

brought from another state, but only taxed in the usual way as other goods are."

Robbins vs. Shelby Co., 120 U. S., 501.

THE RIGHT OF THE STATE TO TAX TRADES, PROFESSIONS, AND OCCUPATIONS, CAN NOT BE QUESTIONED BY THE FEDERAL GOVERNMENT.

The volume of business on which the tax in question was based, as set forth in the agreed statement of facts, is the entire volume of business of the plaintiff in error on the sales of all cars. The Supreme Court of Pennsylvania has construed the act and has decided that it is a revenue act and is not a tax upon property but a tax upon the business of vending merchandise.

"The tax imposed is not specifically upon property but on the business of selling."

Knisely vs. Cotterel, 196 Pa., 628.

"No doubt can be entertained of the right of a State Legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in an-

other State does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

Ficklen vs. Shelby County, 145 U. S., 1.

It will be noticed that the above principle was laid down in regard to a broker engaged in general business. We contend that there is no good reason why the same principle should not be applied to a dealer engaged in general business.

Mr. Chief Justice Fuller also says in his opinion in that case:

"Although their principals happened during 1887, as to the one party, to be wholly non-resident, and as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents."

So we say in the present case that admitting that the majority of defendant's sales are of foreign cars, yet this fact is not material in determining their liability under the act of 1899 because they are engaged in the GENERAL business of automobile dealers.

In *Brennan vs. City of Titusville,* 153 U. S., 289, Mr. Justice Brewer says: (Page 306).

"The case of Ficklen against Shelby County Taxing District—is no departure from the rule of decision so firmly established by the prior cases."

See also *Hopkins vs. U. S.,* 171 U. S., 592, and *Stockard vs. Morgan,* 185 U. S., 35.

Under the foregoing authorities and statement of facts the defendants in this case are engaged in business as *general dealers* in automobiles; they purchase some of their cars from non-residents and others from residents, and they are, therefore, within the decision in the case of *Ficklen vs. Shelby County,* and therefore taxable in this proceeding. The Ficklen case decided in 1891 has never been overruled, but on the other hand has been expressly approved on its facts in several later cases.

We submit that we have affirmatively established that even though the transaction between the plaintiff in error and its customer might to some extent consist of inter-state commerce, nevertheless, inasmuch as no attempt was made to regulate such commerce, and as there was no discrimination against it, it must follow under the foregoing authorities that the plaintiff in error was within the terms of the act of May 2, 1899, and subject to the tax imposed by it.

THE CASES CITED BY THE PLAINTIFF IN ERROR TO SUSTAIN ITS POSITION ARE CLEARLY TO BE DISTINGUISHED FROM THE PRESENT ONE.

In *Dozier vs. Alabama,* 218 U. S., 124, a non-resident manufacturer of pictures and picture frames made sales by an agent who took the orders in the State of Alabama. The Court said (page 127):

> "The pictures and frames were sent to the agent, and remained the property of the company until paid for and delivered."

There was, therefore, but one sale, and that by a non-resident of Alabama to a citizen thereof. It will be conceded at once that to tax such a transaction is entirely beyond the power of any state.

And so in *Rearick vs. Pennsylvania,* 203 U. S., 507, where the sale was made in the same way. The Court said (page 511):

> "The fair meaning of the agreed fact that the orders were given to agents employed to solicit them is that the company offered the goods and that the orders were acceptances of offers from the other side."

The same may be said of *Coldwell vs. North Carolina,* 187 U. S., 622, where the Court describes the method in which the business was carried on in the excerpt from the opinion printed on page 18 of the brief of plaintiff in error.

In *Brennan vs. Titusville,* 153 U. S., 289, the method of carrying on the business in the taxing state by the non-resident was almost identical, and is thus described by Mr. Justice Brewer in the opening words of his opinion (page 297):

> "The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state can send an agent into another state to solicit orders for the products of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods."

The facts in *Robbins vs. Taxing District,* 120 U. S., 489, were similar. The agreed statement of facts was that

> "Sabine Robbins is a citizen and resident of Cincinnati, Ohio, * * * engaged in the business of drumming in the taxing district of Shelby County, Tennessee, that is, soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Company,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio."

Not one of these decisions presents a case where there are two separate and distinct sales, one by the non-resident to the resident, and the other by the latter to another resident. It is this difference in the facts which marks the all-important distinction between the case at bar and the decisions cited by the plaintiff in error, and it is this distinction which subjects the sale of the automobiles, in Pennsylvania, by the plaintiff in

error, to the provisions of the taxing statute. In all the similar cases cited by the plaintiff in error there was but one sale, to-wit, by a non-resident through the instrumentality of an agent or solicitor, to a resident. In this case there are two.

Lyng vs. Michigan, 135 U. S., 166, presented a case where the State of Michigan sought to totally prohibit the sale therein of an article introduced from another state. This, of course, was beyond its power.

> "In *Leisy vs. Hardin* and *Lyng vs. Michigan,* the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce, and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void."
>
> *American Steel & Wire Company vs. Speed,* 192 U. S., 521.

Welton vs. Missouri, 91 U. S., 275, was decided by this Court upon the express ground of discrimination.

> "We held in *Welton vs. Missouri,* 91 U. S., 275, that goods brought into a state for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the state or because they are the products of another state."
>
> *State Tax Case,* 15 Wall., 284.

THERE IS NO JUSTIFICATION FOR THE ALLEGATION THAT THE PENNSYLVANIA COURTS DISREGARDED THE AGREED STATEMENT OF FACTS.

The chief basis of this contention and allegation is the alleged ignoring of the statement in the agreed facts to the effect that Banker Brothers Company, a Pennsylvania corporation, is the exclusive agent and representative of the said George N. Pierce Company for the Pittsburgh territory, "as specifically described and mentioned in the contract * * * marked Exhibit 'A.'" An understanding of this proposition requires a statement of facts. This action was not instituted solely for the purpose of determining the liability of Banker Brothers Company, but to ascertain the liability of all automobile dealers in the City of Pittsburgh, and the plaintiff in error was selected as the defendant in this, the test case, for the reason that the manner in which its business was conducted was a fair sample of the transaction of similar business by all the other dealers. As is stated in the amendment to the statement of facts (Record, p. 58), the plaintiff in error in addition to selling the Pierce Great Arrow automobiles was also engaged in the selling of three other makes of automobiles. As to each of these it had a separate contract with the manufacturer, and the contract which it had with the Pierce Company, which is Exhibit "A," was selected as a contract typical not only of its relations with the other manufacturers, but of the relations of all similar dealers with manufacturers. One or more of its contracts with the other manufacturers contained a clause in which it was designated as the exclusive agent or representative of the manufacturer, and with-

out any thought of agreeing as to what the relation between the plaintiff in error and the manufacturer of automobiles actually was, this phrase was inserted in the agreed statement of facts, but coupled with the reference to the contract which was made a part of that statement. That it was not the intention to place any interpretation or construction on the contract is shown by the subsequent paragraph of the statement of facts wherein it is agreed:

> "In order that a fair and just conclusion may be arrived at as respects the question involved in this case, neither the parties hereto attaches any significance to the use of the words 'dealer' or 'agent' wherever the same may appear in said contract Exhibit 'A.'"

The terms were simply used as a general trade designation for the relation of the plaintiff in error to the manufacturer of the automobile it sold without any intent to indicate the legal relations between them. That the parties should have undertaken to agree to a construction of a contract which defined the relations between the manufacturer and the plaintiff in error is beyond understanding in view of the fact that the real purpose of the case was to secure a legal adjudication of those relations and the consequent conclusion as to the real nature of the business in which the plaintiff in error was engaged. If the construction of this contract was a matter of agreement, as is now contended, what reason was there for submitting the matter to legal determination. We submit then that the terms "agent" and "representative" could not have been placed in the statement of facts with any such idea in mind, but were merely inserted therein as descriptive of trade names without in any way intending to agree as a fact that

such, in point of law, was the relation between the manufacturer and the plaintiff in error.

It may be conceded that in view of the present contention of the plaintiff in error that the words should not have appeared therein. But finding them there we nevertheless contend that they do not support the construction placed thereon by the plaintiff in error. The question of the relation between Banker Brothers Company and the manufacturer under the contract is clearly one of *law*, while the only province of a case stated is to present the *facts* on which the legal conclusion is to be predicated. The construction of the paper is for the Court.

> "Whether or not it is an agreement to lend is a question of law and not a question of fact."
> *Garden Spring Ice Co. vs. Hawk*, 29 Pa. Super. Ct., 17:

If a conclusion of law is inserted in a case stated it is to be disregarded.

> "When, therefore, the parties undertook to incorporate in the submission the further statement —not of a matter of fact but a mere conclusoin of law—it was, to say the least, a mere work of supererogation:
>
> *Southern Ry. Co. vs. Greenville*, 49 S. Carolina, 452.

This is the view which the Court of Common Pleas of Allegheny County and the Superior Court of Penn-

sylvania took of the matter. But aside from all this, the use of the words does not admit of the construction which the plaintiff in error contends for. It will be noted that the statement is that the plaintiff in error is the exclusive agent and representative * * * *as specifically described and mentioned in the contract entered into between the said George N. Pierce Company and the defendant; a copy of which is hereto attached and made part thereof.* So that this contract is a part of the agreed statement of facts. Can it then be said that a construction has been agreed upon when it is positively stated that the contract is a part of the agreed statement of facts? If the contention of the plaintiff in error is correct, then in this particular we have a positive conflict in the statement of facts as to the relation between the parties, provided the contract bears the construction for which the defendant in error contends. Again, there is the subsequent agreement that no significance is to be attached to the words "agent" and "dealer" wherever they may appear. Manifestly this was inserted in order that the whole question might be open for construction and determination, and with a fair attitude toward the position of the plaintiff in error.

It is submitted, therefore, that there can be no justification for this contention on the part of the plaintiff in error, and that the Court of Common Pleas and the Superior Court took the fair view of the entire matter in construing the written contract between the parties, and that the construction placed by them upon

the said contract and the conduct of the parties thereon is correct.

All of which is respectfully submitted.

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BANKER BROTHERS COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

No. 72. Argued November 17, 1911.—Decided December 4, 1911.

The relation of vendor and vendee, and not that of principal and agent, exists where the manufacturer sells goods to another under exclusive contract and delivers goods only on payment of draft attached to bill of lading.

In this case *held*, that goods manufactured in another State and delivered only, in pursuance of contract, after payment of draft attached to bill of lading, are at rest and subject to the laws of the State while in the hands of the consignee before delivery by him to a purchaser from him, notwithstanding the consignee only ordered them after a contract with the purchaser had been made.

Where the relation of principal and agent exists between one selling goods in one State which are manufactured in another State and the manufacturer, sales made by the former within his own State are not interstate commerce transactions but are subject to the taxing power of the State.

Where the transaction of sale of an article manufactured in another State is wholly intrastate, as between vendor and vendee, it does not become interstate and immune from state taxation because the purchaser pays freight from the place of manufacture or because the purchaser obtains a warranty direct from the manufacturer.

THE facts, which involve the constitutionality of a statute of Pennsylvania taxing sales of automobiles, as enforced in this case, are stated in the opinion.

Mr. Edward J. Kent and *Mr. Harvey A. Miller* for plaintiff in error:

The plaintiff in error is engaged in interstate commerce, and, therefore, not liable to taxation by the State. *Dozier* v. *Alabama*, 218 U. S. 124; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Colwell* v. *North Carolina*, 187 U. S. 622;

Robbins v. *Shelby County*, 120 U. S. 489; *Wilton* v. *Missouri*, 91 U. S. 275; *Brennan* v. *Titusville*, 153 U. S. 289; *Lyng* v. *Michigan*, 135 U. S. 166.

The automobile sold is always actually ordered and the order signed by the purchaser submitted to the factory at Buffalo, New York, where it must first be accepted, after which the automobile is shipped to fill the order to the particular individual named therein.

Mr. George H. Calvert, with whom *Mr. John C. Bell*, Attorney General of the State of Pennsylvania, *Mr. James M. Magee*, *Mr. Donald Thompson* and *Mr. Murdoch Kendrick*, were on the brief, for defendant in error:

Merchandise, even though an article of interstate commerce, is subject to state taxation, provided the act imposing such tax does not attempt to regulate interstate commerce or discriminate against it. *Brown* v. *Maryland*, 12 Wheat. 436; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 520; *Emert* v. *Missouri*, 156 U. S. 320; *American Express Co.* v. *Iowa*, 196 U. S. 146; *Darnell* v. *Memphis*, 208 U. S. 119; *Phillips* v. *Mobile*, 208 U. S. 479.

Upon receipt of the automobile by Banker Brothers Company, it had reached its destination and was at rest in the State within the meaning of that rule. *General Oil Co.* v. *Crain*, 209 U. S. 228; *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 578; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 96.

The act levying the tax does not attempt to regulate interstate commerce and does not discriminate against it. *Robbins* v. *Shelby Co.*, 120 U. S. 501.

The right of the State to tax trades, professions, and occupations, cannot be questioned by the Federal Government. *Knisely* v. *Cotterel*, 196 Pa. St. 628; *Ficklen* v. *Shelby County*, 145 U. S. 1.

Admitting that the majority of defendant's sales are of foreign cars, yet this fact is not material in determining

their liability under the act of 1899 because they are engaged in the general business of automobile dealers. *Brennan* v. *Titusville*, 153 U. S. 289; *Hopkins* v. *United States*, 171 U. S. 592; *Stockard* v. *Morgan*, 185 U. S. 35.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Banker Brothers Company, a corporation doing business in Pittsburg, was charged, as retail venders, with a tax of 1 per cent on $351,000 on sales of automobiles to persons in Pennsylvania under a statute of that State. It denied liability on the ground that the sales were interstate transactions. A decision of that point involves the question as to whether Banker Brothers Company acted as principal or as agent of a New York manufacturer.

It appears that the George N. Pierce Company was engaged in the business of manufacturing automobiles in Buffalo, and in 1905 made a contract by which it agreed "to build for and sell automobiles to Banker Brothers Company at twenty per cent less than list price. Deliveries to be f. o. b. Buffalo as soon as practicable after order for deliveries are received. Payments to be made in cash."

The Banker Brothers Company kept no machines in stock except those used for demonstration, and were allowed to sell only within a restricted territory on terms stipulated by the manufacturer. The purchaser of the machine was to pay at least ten per cent when he signed a printed form addressed to Banker Brothers Company requesting it "to enter my order for ——— motor car, for which I agree to pay the list price f. o. b. factory, as follows: $——— upon signing this order, and the balance upon delivery of the car to me."

The name of the Pierce Company did not appear anywhere on this printed form furnished by it, but when the Banker Brothers Company accepted the order it remitted the cash to the Pierce Company. If the latter accepted

the order, it agreed thereupon to make the automobile and ship it, drawing on Banker Brothers Company for the balance of the list price, less twenty per cent, with bill of lading attached. The Banker Brothers Company, on paying the draft, took up the bill of lading, received from the carrier an automobile which though shipped in interstate commerce had become at rest in the State of Pennsylvania. Banker Brothers Company had the title and delivered it to the buyer on his paying the balance of the purchase money. Compare *Dozier* v. *Alabama*, 218 U. S. 124. The written contract was silent on the subject, but it was stipulated that the Pierce Company warranted the machine direct to the purchaser.

It is contended that Banker Brothers Company were agents and the Pierce Company an undisclosed principal. It is urged that the sale was an interstate transaction between the manufacturer and the purchaser, with Banker Brothers Company merely acting as an agent which looked after the delivery of the machine and collected the purchase price.

This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But as between Banker Brothers Company and the Pittsburg purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him and under the duty of paying to the State a tax on the sale.

The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase the Pierce Company would have no right to sue him on the

contract. The fact that he was liable for the freight by virtue of the agreement to "pay the list price f. o. b. factory" did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the manufacturer direct.

These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *American Express* v. *Iowa*, 196 U. S. 133, 146. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania.

Affirmed.